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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1995

COGGESHALL DEVELOPMENT CORP. AND
COGGESHALL MARINA, INC.,
PETITIONERS,

v.

THE UNITED STATES,
RESPONDENT.

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the authority granted to the Secretary of the Navy under 10 U.S.C. § 2481(a) supercedes the authority granted to the Administrator for the supervision and direction over the disposition of surplus property under 40 U.S.C. § 484(a) and (d).

2. Whether the Court of Appeals for the Federal Circuit declined to perform its obligation to review the facts and law of this case.

List of Parties

The parties to the proceedings below were Coggeshall Development Corp. and Coggeshall Marina, Inc.[1] The respondent before this Court is the United States.

[1] Coggeshall Development Corp. and Coggeshall Marina, Inc. are private, closely held corporations organized under the laws of the State of Rhode Island. The corporations have no parent or subsidiary entities.

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PETITION FOR A WRIT OF CERTIORARI

Coggeshall Development Corp. and Coggeshall Marina, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals (A-1) is reported at 33 F.3d 64. The opinion of the Court of Federal Claims (A-3) is reported at 29 Fed.Cl. 264.

JURISDICTION

The court of appeals entered its judgment on May 10, 1995 (A-1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 2481. **Utilities and services; sale; expansion and extension of systems and facilities**

(a) Under such regulations and for such periods and at such prices as he may prescribe, the Secretary concerned or his designee may sell or contract to sell to purchasers within or in the immediate vicinity of an activity of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, any of the following utilities and related services, if it is determined that they are not available from another local source and that the sale is in the interest of national defense or in the public interest:

(1) Electric power.
(2) Steam.
(3) Compressed air.
(4) Water.
(5) Sewage and garbage disposal.
(6) Natural, manufactured, or mixed gas.
(7) Ice.
(8) Mechanical refrigeration.
(9) Telephone service.

(b) Proceeds of sales under subsection (a) shall be credited to the appropriation currently available for the supply of that utility or service.

(c) To meet local needs the Secretary concerned may make minor expansions and extensions of any distributing system or facility within an activity through which a utility or service is furnished under subsection (a).

28 U.S.C. § 1295. **Jurisdiction of the United States Court of Appeals for the Federal Circuit**

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction —

. . .

(3) of an appeal from a final decision of the United States Claims Court; . . .

28 U.S.C. § 1491. **Claims against the United States generally; actions involving Tennessee Valley Authority**

(a) (1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated and unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of application records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon

any claim by or against, or dispute with a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

40 U.S.C. § 471. **Congressional declaration of policy** It is the intent of the Congress in enacting this legislation to provide for the government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management or public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management. (63 Stat. 377)

40 U.S.C. § 484. **Disposal of surplus property**

(a) *Supervision and direction.* Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

. . .

(d) *Validity of deed, bill of sale, lease, etc.* A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this title shall be conclusive evidence of compliance with the provisions of this title insofar as concerns title or other interest of any bona fide grantee

or transferee for value and without notice of lack of such compliance.

R.I. General Laws, 1984 Reenactment, § 34-11-28. **Rights, privileges, and appurtenances included in grant.** — In any conveyance of real estate all rights, privileges and appurtenances belonging or appertaining to the granted estate shall be included in the conveyance, unless a different intention shall clearly appear in the deed, and it shall be unnecessary to enumerate or mention them either generally or specifically.

STATEMENT

Coggeshall Development Corp. and Coggeshall Marina, Inc., two Rhode Island business corporations, are the Petitioners before this Honorable Court. The Petitioners were plaintiffs before the United States Court of Federal Claims and have taken this appeal from the Court of Appeals for the Federal Circuit's affirmation of the trial court's Judgment of August 15, 1994.

On February 13, 1978, the General Services Administration ("GSA") deeded to the Rhode Island Port Authority and Economic Development Corporation ("RIPA") certain land in Portsmouth, Rhode Island, which had become surplus to the needs of the government. The conveyance by GSA (hereinafter "GSA Deed") was pursuant to the Federal Property and Administrative Services Act of 1949 (63 Stat. 377) as amended and applicable rules, orders and regulations. (A-69). RIPA had been created for the purpose of acquiring surplus property in order to reduce the economic impact resulting from a substantial withdrawal of the Navy's activities in the State of Rhode Island. RIPA's sole purpose was to make the land and facilities acquired from the Navy economically productive.

The GSA Deed stated in part as follows:

"The Grantor hereby grants to Grantee all sewer lines located within said Parcels 1 and 2, along with the perpetual and assignable right to connect at the boundary of Grantee's property with certain sewer mains owned by Grantor and located on other land of Grantor. Grantor covenants that it will maintain its sewer mains and appurtenances which connect sewer lines in the fee area to the City of Newport's public sewer system. The Grantee by acceptance of this Deed covenants that it shall pay the pro-rata costs (based on use) of maintaining Grantor's connecting system resulting from Grantee's use thereof, direct charges assessed to Grantee by the furnishing utility or entity; provided that Grantor's obligation to maintain the same shall terminate at such time as such sewer service shall become available to Grantee by a public utility, without utilizing sewer lines then owned by Grantor; and provided that Grantee's obligation to pay the pro rata costs of maintaining Grantor's connecting sewer system shall terminate upon Grantee obtaining such public utility service. Grantee shall be allowed a reasonable time to obtain such public utility sewer service after same shall become available."
A-71.

RIPA transferred by two deeds to the Petitioners on December 30, 1986, approximately 20.3 acres of land received from GSA together with an option to acquire additional land, increasing the total parcel to the entire 28 plus acres of land conveyed by GSA to RIPA. (A-79 and A-82). While owned by RIPA, the land deeded to Petitioners had been leased to a tenant, Bend, Inc., for industrial and commercial purposes including a boat building facility and a marina. The plans for the use of the property had also included residential, hotel and shopping area uses.

When RIPA in its deeds conveyed the property to the Petitioners, RIPA granted "all those rights and easements apper-

taining thereto granted to Grantor by the USA Deed", which referred to the original deed from GSA dated February 13, 1978. (A-79 and A-82).

Petitioners, as grantees of RIPA's deeds, applied to the Planning Board of the Town of Portsmouth for permission to create a subdivision with the development of certain condominiums and other waterfront development. The Planning Board of the Town of Portsmouth notified the Navy as an occupant of the abutting land of the nature of the application filed by the Petitioners. The Navy notified the Planning Board of the Town of Portsmouth by a letter dated April 15, 1987, that there was a sewer discharge limit for the Bend Boat Basin area set at 12,000 gallons per day and further that use of water and the road systems was not available to support any such development. (A-8).

The letter from the Navy further stated that the utilities into the Petitioners' land could only support what presently existed and that expansion of the area or tie-ins to the utilities could not be supported. "Sewerage and water for the proposed subdivision cannot be obtained through the Navy utilities." (A-8). By separate letter dated 26 April 1988, the Navy informed the attorney for the Petitioners that the

> "Navy sewer system will not accommodate additional sewerage from your client's private civilian housing development. Additionally, it is not in the Navy's present or future interest to permit such private party connection. Therefore, initiation of any work by your client relating to the Navy's sewer system will serve no useful purpose." A-87.

In response to Petitioners' application to GSA, the Administrator of GSA, by letter dated May 10, 1988, stated that in view of the Navy's opposition "under the circumstances, we regret that we cannot be of further assistance on this matter." (A-89).

A. *Proceedings Below*

On July 19, 1988, Petitioners brought an action in the U.S. District Court for the District of Rhode Island requesting relief in the nature of mandamus for use of the government sewer system to develop their property. Relief was granted by the Chief Judge of the U.S. District Court who found that

> "Plaintiffs seek only to enforce the contractual easement rights granted them by the United States in a deed to their property. . . . Plaintiffs are entitled to the 'perpetual and assignable right to connect . . . with the sewer mains owned by [the United States]' as stated in the deed. That has already been agreed to. The United States granted this right. The government is not afforded the opportunity to renege on its agreements. It must meet the obligations exactly in the same fashion as any other party to a solemn agreement."

Coggeshall v. *Diamond*, C.A. No. 88-0448B, slip op (D.R.I. Dec. 22, 1988) (A-66)

On appeal to the First Circuit Court of Appeals, the Circuit Court, noting that "[a]lthough Coggeshall sought an order to compel officers of the U.S. to perform what it claims is a ministerial duty owed to it by the U.S., the real party defendant is the U.S." *Coggeshall* v. *Diamond*, 884 F.2d 1 (1st Cir. 1989), characterized the action as one for breach of contract. The court stated that "[t]he only remedy to which the U.S. has consented in cases of breach of contract is to *payment of money damages*" and accordingly that jurisdiction was properly with the U.S. Court of Federal Claims. (A-52). The District Court decision was then vacated.

On November 13, 1990, an action was instituted in the U.S. Court of Federal Claims pursuant to the Tucker Act [28 U.S.C. §1491(a)]. The trial court conducted a bifurcated trial without a jury on June 7, 8 and 9, 1993, and an option dismissing the claim was rendered on September 1, 1993. Appeal

was taken to the U.S. Court of Appeals for the Federal Circuit on October 29, 1993, and it was determined that the trial court had failed in the bifurcated trial to make reference to the disposition of a counterclaim filed by the United States in the trial court opinion. The first appeal was dismissed and the trial court then entered its order based upon a stipulation dismissing the counterclaim and entered its corrected judgment. Appeal from the corrected judgment was taken on August 24, 1994. Oral argument was heard on May 8, 1995, and the Court of Appeals for the Federal Circuit issued a Judgment without opinion on May 10, 1995, affirming the decision of the trial court. The matter is before this Honorable Court on Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

During the seven-year period of this litigation, Petitioners have found no case law in which construction of a deed of surplus property from the United States to a private party was at issue. This case appears to be one of first impression and one with potentially far reaching consequences for any persons or entities who have ever contracted for real property with the United States government. The case involves an important conflict of two federal statutes. The need for guidance from this Court is compelling. The basic issue is the liability of the United States to private parties as defined in a deed. The decision below is erroneous for a number of reasons including one fundamental factual error and the issue that it raises is important.

I. THE TRIAL COURT WRONGFULLY IDENTIFIED THE NAVY AS A PARTY TO THE TRANSACTIONS WHICH FORM THE BASIS FOR THIS LAWSUIT AND DETERMINED THAT PURSUANT TO 10 U.S.C. § 2481(A) THE AUTHORITY OF THE SECRETARY OF THE NAVY IS SUPERIOR TO THE AUTHORITY OF THE ADMINISTRATOR UNDER 40 U.S.C. § 484(A) AND (D).

This argument relates to the direct conflict in the trial court's opinion between 10 U.S.C. § 2481(a) and 40 U.S.C. § 484(a) and (d). The trial court had before it the pleadings and decision in the United States District Court and the United States' appeal to the First Circuit Court of Appeals. In its denial of United States' motion to dismiss, the trial court correctly identified the parties to this action and that Petitioners' rights were established in the GSA Deed to RIPA. Although the Administrator of GSA conveyed the property to RIPA (Petitioners' grantor), the trial court made reference in its decision on the cross motions for summary judgment to the defendant party in interest in this case as being the United States Navy, not the United States. (A-30).

> "Defendant is the United States, acting through its agent the *United States Navy (Navy)*". (emphasis added)
> A-31.
>
> * * *
>
> "The Navy occupies property adjacent to plaintiffs' property. The sewer line from plaintiffs' property is connected to a sewer line *owned by the Navy at the property line that plaintiffs share with the Navy*. The *Navy's sewer line* traverses *the Navy's property* and ultimately connects at the Newport Treatment Facility (Newport Facility) in Newport." (emphasis added)
> A-33.
>
> * * *
>
> "The Navy informed the Planning Board that it had imposed a 12,000 gallon per day (gpd) limitation on

sewage discharge from the Bend Boat Basin area, that utilities into the Bend Boat Basin could only support this existing limitation, and that the *Navy's sewer system would not accommodate additional sewage service* from the proposed subdivision. GSA subsequently adopted the Navy's position." (emphasis added)
A-34.

* * *

"To grant either party summary judgment in the present case, the court must determine, as a matter of law, *whether the Navy breached the GSA deed* by refusing to accept the additional 60,000 of gpd sewage effluent that plaintiffs requested to discharge *into the Navy's sewer system.*" (emphasis added)
A-36.

* * *

"First, the court must decide if a genuine issue of fact exists as to *whether the original parties to the GSA deed — RIPA and the Navy —* intended the GSA deed to be an exclusive and final expression of their agreement." (emphasis added)
A-36.

* * *

"In the instant case, both parties flatly disagree on the intent of the original parties to the GSA deed. *They dispute whether RIPA and the Navy intended the GSA deed to be a completely integrated document.* (emphasis added)
A-37.

* * *

"*. . . how much sewage service that the Navy must provide to RIPA's property.*" (emphasis added)
A-37.

* * *

"Defendant alleges that, prior to executing the GSA deed, *RIPA and the Navy orally agreed to limit effluent discharge into the Navy's sewer system* to 12,000 gpd." (emphasis added)
A-37.

* * *

"The court finds that *the parties' arguments*, together with the evidence that each party has submitted, are sufficient to put into issue *whether RIPA and the Navy intended* the GSA deed to be a final integrated document. Therefore, the court concludes that the parties' intent is a material issue of fact that must be determined at trial." (emphasis added)
A-37.

The same reference to the Navy as a party was made in the opinion from which this appeal is taken. (A-3).

"Defendant is the United States, acting through its agent, the *United States Navy (Navy)*". (emphasis added)
A-4.

* * *

"The sewer line on plaintiffs' property is connected to a sewer line *owned by the Navy at the property line that plaintiffs share with the Navy*. The *Navy's sewer line* traverses *the Navy's property* and ultimately connects at the Newport Treatment Facility (Newport Facility) in Newport." (emphasis added)
A-7.

* * *

"The Navy informed the Board [Portsmouth Planning Board] that it had imposed a 12,000 gallon per day (gpd) limitation on sewage discharge from the Bend Boat Basin area *into the Navy's sewer system*, that sewer utilities into the Bend Boat Basin area could support only this existing

> limitation and that the *Navy's sewer system would not accommodate additional sewage service* from the proposed subdivision. GSA subsequently adopted the Navy's position." (emphasis added)
> A-8.

In the opinion of the trial court as affirmed by the Court of Appeals for the Federal Circuit, the trial court determined that the United States was acting through its agent, the United States Navy, and that the real property in Rhode Island had changed hands several times to which plaintiffs (Petitioners here) are the current successors in title. As the record clearly shows, there was only one transfer of title by RIPA to Petitioners. (A-79 and A-82). The Navy was never a party to any deed in the chain of title.

In denying Petitioners' motion for summary judgment, the trial court referred to "the GSA Deed", but then went on to erroneously determine that the sewer lines on the property occupied by the Navy were owned by the Navy and that the sewer system was the Navy sewer system. (A-30). The trial justice, in denying the cross motions for summary judgment, stated that whether the Navy breached the GSA Deed by refusing to accept sewerage effluent into the "Navy's sewer system" was a necessary determination before either party could be granted summary judgment.

> "To answer this question, the Court must interpret the GSA deed. . . . Thus, in ruling on the parties' summary judgment motions, the court must make at least two determinations. First, the court must decide if a genuine issue of fact exists as to whether the original parties to the GSA deed — RIPA and the Navy — intended the GSA deed to be an exclusive and final expression of their agreement. Second, if the court determines that the GSA deed is incomplete, then the court must determine the original parties' intent regarding the material terms miss-

ing from the document."
A-36.

The determination on the motion for summary judgment was as follows:

> "The Court finds that the parties' arguments, together with the evidence that each party has submitted, are sufficient to put into issue whether RIPA *and the Navy* intended the GSA Deed to be a final integrated document. Therefore, the Court concludes that the parties' intent is a material issue of fact that must be determined at trial." (emphasis added)
> A-37.

In the preparation of its opinion, as affirmed by the court of appeals, the trial court again stated that the

> "Defendant is the United States acting through its agent, the United States Navy (Navy). The deed at issue concerns real property in Rhode Island that has changed hands several times and to which Plaintiffs are the current successors in title."
> A-4.

As previously stated, the property had been transferred by the GSA to RIPA and from RIPA only to Petitioners.

The opinion correctly quotes the following portions of the GSA Deed:

> "[T]he UNITED STATES OF AMERICA, acting by and through the ADMINISTRATOR OF GENERAL SERVICES, under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Services Act of 1949 . . . as amended . . . grants to the RHODE ISLAND PORT AUTHORITY AND ECONOMIC DEVELOPMENT

CORPORATION ... two certain parcels of land ... shown as Parcel 1 and Parcel 2 on a Plan attached hereto and made a Part hereof, entitled "BEND, INC. BOAT BASIN MELVILLE PORTSMOUTH RHODE ISLAND. ... The Grantor hereby grants to Grantee all sewer lines located within said Parcels 1 and 2, along with the perpetual and assignable right to connect at the boundary of Grantee's property with certain sewer mains owed by Grantor and located on other land of Grantor. Grantor covenants that it will maintain its sewer mains and appurtenances which connect sewer lines in the fee area to the City of Newport's public sewer system. The Grantee by acceptance of this Deed covenants that it shall pay the pro-rata costs (based on use) of maintaining Grantor's connecting system resulting from Grantee's use thereof, direct charges assessed to Grantee by the furnishing utility or entity; provided that Grantor's obligation to maintain the same shall terminate at such time as such sewer service shall become available to Grantee by a public utility, without utilizing sewer lines then owned by Grantor; and provided that Grantee's obligation to pay the pro rata costs of maintaining Grantor's connecting sewer system shall terminate upon Grantee obtaining such public utility service. Grantee shall be allowed a reasonable time to obtain such public utility sewer service after same shall become available." A-69.

* * *

"Wherever in this Deed reference is made to the Grantor or Grantee, the same shall be read and construed so as to include the successors in title and assigns of both Grantor and Grantee, as well as any person, firm or entity claiming by, through or under said Grantor or Grantee, and their respective successors in title and assigns.

> All covenants and agreements as are herein contained in this Deed, whether made by Grantor or Grantee, shall be deemed and shall constitute covenants running with the land, and shall be binding upon the successors in title and assigns by both Grantor and Grantee, and those claiming by, through or under either of them, including without limiting the foregoing generality, estates for a term of years except that the covenants and agreements of the Grantor shall cease to run with the land if the same shall have lapsed as aforesaid."
> A-74.

As indicated in the GSA Deed, the United States, as Grantor, expresses the understanding that the sewer lines sold to the grantee are owned by the United States and connect with certain sewer mains also owned by the United States and located on the other land of the United States. The United States then covenants that it will maintain its sewer mains and appurtenances which connect the sewer lines in the property sold to RIPA to the City of Newport's public sewer system.

It may be advisable here to explain that under the GSA Deed the property sold to RIPA, and subsequently to the Petitioners, was connected to the municipal sewer treatment plant owned by the City of Newport and located on City property across from the property deeded to the Petitioners. The sewer effluent on the Petitioners' property was carried through United States owned sewer mains to other property of the City of Newport and ultimately, to the Newport Sewer Treatment Plant. The so-called Navy system, or Navy sewer system, is non-existent as a sewer system in that there is no treatment of the effluent, but it is simply transported to the Newport Facility. The pipes and the pumping stations, which are utilized in the system belong to the United States and there is no treatment of effluent except by the City of Newport. It appears that the trial court was confused on the facts starting with plaintiffs' (Petitioners') motion for summary judgment and extending through the trial to the trial court's opinion

that somehow or other the Navy became a party to the GSA Deed and then continued to independently act as though some discretion had been given in the original deed regarding how much effluent could pass through the sewer mains belonging to the United States. Indeed, the trial court in its opinion at A-8, footnote 2, and in numerous other locations in the opinion, indicates erroneously that the Navy owned the sewer line and that the Navy owned the 28.8 acre parcel which was conveyed by the United States through GSA.

The trial judge in his opinion (A-10) has indicated that the dispute in the present case regards the level of sewer service that the Navy must supply to plaintiffs' (Petitioners') property under the terms of the GSA Deed. The trial court goes on to say that the deed is silent on the scope of the Navy's obligation to provide sewer service. Although the trial court acknowledges that the original parties to the GSA Deed were RIPA and GSA, the trial justice believed the "Navy's intentions" regarding the sewer system were critical because "*the Navy continued to own and operate the sewer system* that RIPA and its successors-in-title contracted to use." (emphasis added) (A-10, footnote 4).

The trial court interpreted the Navy, not GSA, as having an obligation under the GSA Deed, but that

> "The GSA deed is silent on the scope of *the Navy's obligation to provide sewer service.* Two questions were presented at trial: (1) whether the original parties to the GSA deed — RIPA and GSA — intended the GSA deed to be a final, integrated document; and (2) if RIPA and GSA did not intend the GSA deed to be a final, integrated document, then what terms did RIPA and GSA intend to read into the GSA deed regarding *the amount of sewage that the Navy was to allow RIPA and its successors-in-title to discharge into the Navy's sewer system.*" (emphasis added)
> A-10.

The trial court's opinion, when it considered the "Defendant's Liability," chose to insert the Navy as the defendant. The trial court then completely disregarded the United States' obligation to maintain its utilities as expressed in the GSA Deed and stated:

> "Pursuant to 10 U.S.C. 2481(a) (1988), the Navy has the authority to control the sewage service that it provides to Plaintiff's property."
> A-23.

In the footnote following the citation and explanation of 10 U.S.C. § 2481(a), the court then expands on the authority of the Secretary of the Navy by citing the policy in effect at the time of the GSA Deed. A-23.

The trial court had before it the Navy's Disposal Report (A-85) by which the Navy had authorized the statutory release in Rhode Island to GSA of the surplus property, which includes Petitioners' property. Despite the fact that the Navy Disposal Report had no restrictions or qualifications relating to the sewer service of the property, the trial court persisted in giving the Navy the controlling authority in regard to the apparent conflict between 10 U.S.C. 2481(a) and 40 U.S.C. 484(a) and (d).

Perhaps the most telling expression of the trial court's confusion of the Navy for the defendant is the last sentence of the opinion

> "Thus the court finds the Navy did not violate the GSA deed by refusing to provide plaintiffs a level of sewer service in excess of 12,000 gpd."
> A-28.

It is readily apparent that both the Navy and GSA through their respective negative responses to Petitioners (A-87 and A-89) believe the authority of the Navy is superior in this matter to the GSA covenants in the deed.

This Court should grant certiorari to review this important conflict and factual error.

II. The Decision Of The Court Of Appeals Is Erroneous.

While this Court has independently considered cases involving deed construction[1], the liability of the United States,[2] the United States as a contracting party[3] and the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 471, et seq.)[4], this Court has not previously considered a case in which the rights of Petitioners were based upon the construction of deeds from the United States government. Accordingly, this case appears to be one of first impression in this Court.

The decision of the Court of Appeals is erroneous. First, it ignored altogether the Federal Property and Administrative Services Act of 1949, which is the federal statute controlling the disposition of the surplus property in this case. No men-

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[1] *Reed* v. *Proprietors of Locks and Canals on Merrimac River*, 49 U.S. 274, 8 How. 274, 12 L.Ed. 1077. (It is the duty of the court to give construction to a deed so far as the intention of the parties can be elicited therefrom.)

[2] *U.S.* v. *Mitchell*, 100 S.Ct. 1349, 445 U.S. 535, 63 L.Ed.2d 607, reh. den. 100 S.Ct. 2979, 466 U.S. 992, 64 L.Ed.2d 849, on remand 664 F.2d 265, 229 Ct.Cl. 1, cert. gr. 102 S.Ct. 2901, 457 U.S. 1104, 73 L.Ed.2d 1312, aff. case remanded 103 S.Ct. 2961, 463 U.S. 206, 77 L.Ed.2d 580. (The United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Reservation.)

[3] *Lynch* v. *U.S*, 54 S.Ct. 840, 292 U.S. 571, 78 L.Ed. 1434. (When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.) *Perry* v. *U.S.*, 55 S.Ct. 432, 294 U.S. 330, 79 L.Ed. 912, 95 A.L.R. 1335. (When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are party to purchase instruments.)

[4] *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 102 S.Ct. 752, 454 U.S. 464, 70 L.Ed.2d 700. (Pursuant to its authority under the Property Clause, Congress enacted the Federal Property and Administrative Service Act of 1949 to provide an economical and efficient system for the disposal of surplus Federal Government property.)

tion of it was made in the decision. Yet, the effect of the decision is to go against the stated intent of that Act towards the economical and efficient disposal of surplus property.

Second, because the trial court's decision effectively nullifies the covenants for sewer use in the GSA deed, it threatens the integrity and plain meaning of a deed from the United States government to a party. Parties who contract with the government by deed cannot trust the integrity of the covenants made therein.

Third, no independent financing will be available for prospective purchasers of government property. Financing agents can have no faith in a title policy that the United States government will stand behind its covenants. An economic and efficient surplus property system becomes a stagnant and wasteful one as properties that are available for sale cannot be sold for want of financing to purchasers. Particularly now, as the military defense budget continues to be cut under the present administration, it is likely that budgets for the maintenance of military properties will shrink, necessitating the designation of more surplus property. A glut of surplus property and a shortage of purchasers is likely to result. The purpose of the Federal Property and Administrative Services Act has been subverted.

III. The Decision Of The Trial Court As Affirmed By The Court Of Appeals Is In Direct Conflict With The Established Law Of Property Easements As Defined By The Federal District Court For The District Of Rhode Island, The Rhode Island Supreme Court And The Rhode Island Legislature.

The language in the deed from GSA to RIPA

> "The Grantor hereby grants to Grantee all sewer lines located within said Parcels 1 and 2, along with the perpetual and assignable right to connect at the boundary

> of Grantee's property with certain sewer mains owned by Grantor . . . A-71
>
> * * *
>
> "[a]ll covenants and agreements as are herein contained in this Deed . . . shall be deemed and shall constitute covenants running with the land and shall be binding on the successors in title and assigns of both Grantor and Grantee.
> A-74.

along with the language in the subsequent deeds from RIPA to Petitioners granted

> "all those rights and easements appertaining thereto granted to grantor by the USA Deed . . ."
> A-79 and A-82.

The trial court completely avoided the express language in both deeds and found instead

> "The evidence that Plaintiffs submit fails to support their proposition that the parties intended a reasonableness standard to govern the level of sewer service available to the property . . ."
> A-15.

Where no words of limitation appear, however, this creates an easement of reasonable use under federal and state law

> "where an easement is created by grant and is not limited in its scope by the terms of the grant, it is available for the reasonable uses to which the dominant estate may be devoted." *Friends of the Sakonnet* v. *Dutra*, 749 F.Supp. 381, 389 (D.R.I. 1990); *Sharp* v. *Silva Realty Corp.*, 134 A.2d 131, 136 (R.I. 1957); (86 R.I. 276.)

Further, pursuant to R.I. General Laws § 34-11-28, 1984 Reenactment, the Rhode Island legislature has stated

> "In any conveyance of real estate all rights, privileges and appurtenances belonging or appertaining to the granted estate shall be included in the conveyance, unless a different intention shall clearly appear in the deed, and it shall be unnecessary to enumerate or mention them either generally or specifically."

Petitioners had the right to rely on all appurtenances being included in the conveyances. Therefore, the decision of the trial court as affirmed by the Court of Appeals for the Federal Circuit is in violation of the federal statutes, the federal and state case law, and the state statute.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
For the Federal Circuit

94-5156

COGGESHALL DEVELOPMENT CORP., AND
COGGESHALL MARINA, INC.,
PLAINTIFFS-APPELLANTS,

v.

THE UNITED STATES,
DEFENDANT-APPELLEE.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS in CASE NO(S) 90-3942L

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

PER CURIAM (LOURIE, SCHALL, and BRYSON, *Circuit Judges):*

AFFIRMED. See Fed. Cir. R. 36.

DATED MAY 10 1995

ENTERED BY ORDER OF
THE COURT
s/Francis X. Gindhart, Clerk
Francis X. Ginhart, Clerk

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAY 10 1995
FRANCIS X. GINDHART
Clerk

In the United States Court of Federal Claims

No. 90-3942 L

COGGESHALL DEVELOPMENT CORP. AND COGGESHALL MARINA, INC.,

v.

THE UNITED STATES

JUDGMENT

FILED AUG 15 1994

Pursuant to the court's order of August 3, 1994, vacating the judgments of September 3, 1993, and June 30, 1994, and directing the clerk to enter a new judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the plaintiffs' complaint is dismissed, and the defendant's counterclaim is dismissed without prejudice. No costs.

David A. Lampen
Clerk of Court
By: Illegible
Deputy Clerk

August 15, 1994

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

In the United States Court of Federal Claims

No. 90-3942L

(Filed September 1, 1993)

**********	*
COGGESHALL DEVELOPMENT CORP. and COGGESHALL MARINA, INC., PLAINTIFFS,	* Government contracts; * Fully integrated v. * incomplete documents; * Parol evidence; Assignee's * rights; Duty to inves- * tigate obvious omissions
v.	
THE UNITED STATES, DEFENDANT.	
**********	*

James M. Sloan, III, Providence, Rhode Island, attorney of record for plaintiffs. *Gardner, Sawyer, Gates, Sloan & Engustian*, of counsel.

Andrew M. Eschen, Washington, D.C., with whom was *Assistant Attorney General Richard B. Stewart*, for defendant.

OPINION

FUTEY, *Judge*.

This contract case is before the court after a trial on the merits. Plaintiffs are successors-in-title to Navy surplus real property and seek compensation from defendant for the alleged violation of the terms of the property's deed; Defendant counters that it has not violated the deed's terms as the original contracting parties intended the terms to be read.

Factual Background[1]

Plaintiffs, Coggeshall Development Corporation (Coggeshall Development) and Coggeshall Marina, Inc. (Coggeshall Marina), are Rhode Island business corporations. Defendant is the United States, acting through its agent, the United States Navy (Navy). The deed at issue concerns real property in Rhode Island that has changed hands several times and to which plaintiffs are the current successors-in-title.

In the early 1970's, the United States government announced that it was planning to reduce the size and scope of operations of the Navy at the Newport Naval Base in Newport, Rhode Island. In 1974, as a result of this restructuring, the Navy declared certain real property, located in nearby Portsmouth, Rhode Island, excess to its needs and transferred the property to the General Services Administration (GSA) for disposition. GSA subsequently determined that the land was surplus to the needs of the United States and offered to sell it to the Rhode Island Port Authority and Economic Development Corporation (RIPA), an agency of the State of Rhode Island created to acquire surplus land of the United States for economic development purposes.

At approximately the same time that GSA was negotiating with RIPA to sell the surplus land to the State of Rhode Island, a private company known as Bend, Inc. (Bend), presented RIPA with a proposal to use approximately 28.8 acres of that land, located in an area now known as the Bend Boat Basin, to run a marina. RIPA approved the Bend project and on February 1, 1978, executed a "Site Lease Agreement" with Bend. Under that instrument, RIPA, as lessor, agreed to lease the 28.8 acres to Bend, as lessee, for an initial term commencing on February 1, 1978, and running through January 31, 1993. RIPA also granted Bend an option to purchase the property at the end of the initial term.

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[1] The court has detailed the facts of this case in two prior opinions. *See Coggeshall Dev. Corp.* v. *United States*, No.90-3942L Unpublished Opinion (Cl. Ct. February 2, 1993); *Coggeshall Dev. Corp.* v. *United States*, 23 Cl. Ct. 739 (1991). The present opinion discusses only those facts relevant to the issues presented at trial.

On February 13, 1978, GSA conveyed to RIPA two parcels of its surplus property totalling approximately 28.8 acres. The deed from GSA to RIPA (GSA deed) provides, in relevant part, that:

> [T]he UNITED STATES OF AMERICA, acting by and through the ADMINISTRATOR OF GENERAL SERVICES, under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Services Act of 1949 . . . as amended . . . grants to the RHODE ISLAND PORT AUTHORITY AND ECONOMIC DEVELOPMENT CORPORATION . . . two certain parcels of land . . . shown as Parcel 1 and Parcel 2 on a Plan attached hereto and made a Part hereof, entitled "BEND, INC. BOAT BASIN MELVILLE PORTSMOUTH RHODE ISLAND . . . . The Grantor hereby grants to Grantee all sewer lines located within said Parcels 1 and 2, along with the perpetual and assignable right to connect at the boundary of Grantee's property with certain sewer mains owned by Grantor and located on other land of Grantor. Grantor covenants that it will maintain its sewer mains and appurtenances which connect sewer lines in the fee area to the City of Newport's public sewer system. The Grantee by acceptance of this Deed covenants that it shall pay the pro-rata costs (based on use) of maintaining Grantor's connecting system resulting from Grantee's use thereof, direct charges assessed to Grantee by the furnishing utility or entity; provided that Grantor's obligation to maintain the same shall terminate at such time as such sewer service shall become available to Grantee by a public utility, without utilizing sewerlines then owned by Grantor; and provided that Grantee's obligation to pay the pro rata costs of maintaining Grantor's connecting sewer system shall terminate upon Grantee obtaining such public utility service. Grantee shall be allowed a reasonable time to obtain such public utility sewer service after same shall become available."

In addition, the GSA deed states the following with respect to successors-in-title and subsequent assignment by RIPA:

> Wherever in this Deed reference is made to the Grantor or Grantee, the same shall be read and construed so as to include the successors in title and assigns of both Grantor and Grantee, as well as any person, firm or entity claiming by, through or under said Grantor or Grantee, and their respective successors in title and assigns.
>
> All covenants and agreements as are herein contained in this Deed, whether made by Grantor or Grantee, shall be deemed and shall constitute covenants running with the land, and shall be binding upon the successors in title and assigns of both Grantor and Grantee, and those claiming by, through or under either of them, including without limiting the foregoing generality, estates for a term of years except that the covenants and agreements of the Grantor shall cease to run with the land if the same shall have lapsed as aforesaid.

On February 27, 1978, pursuant to the Bend-RIPA Site Lease Agreement, Bend, as sublessor, entered into a sublease with Tillotson-Pearson, Inc. (TPI), in order to implement the Bend marina project. The sublease provides, in relevant part, that "BEND is the tenant of [the 28.8 acres constituting the 'Parcel'] pursuant to a certain Site Lease Agreement . . . [with RIPA] . . ." and that it was subletting to TPI certain premises thereon. The sublease defined the term "Parcel" as the entire 28.8 acres that RIPA had acquired from GSA and which it had leased to Bend under the Site Lease Agreement. The sublease between Bend and TPI was recorded in the Portsmouth Records of Land Evidence on February 28, 1978.

On May 1, 1986, Bend was approached by Thomas McLaughlin, the President of Woodman Development Corporation (Woodman), a Boston-based company that expressed interest in acquiring Bend's property interests. Woodman incorporated Coggeshall Development in August 1986, and

Coggeshall Marina in December 1986, in order to acquire Bend's interests.

In the fall of 1986, upon Bend's request, RIPA agreed to accelerate Bend's option to purchase the 28.8 acres under the Site Lease Agreement. On December 5, 1986, Bend and RIPA entered into a Purchase and Sale Agreement under which RIPA agreed to sell the property to Bend.

Also on December 5, 1986, Thomas McLaughlin, on behalf of Coggeshall Development, entered into a mortgage agreement with Bend. Under this agreement Bend was the mortgagor, Coggeshall Development was the mortgagee, and the Bend-RIPA Site-Lease was the mortgaged property. The mortgage instrument stated that it was subject to the earlier recorded sublease between Bend and TPI.

Under the terms of the Purchase and Sale Agreement between Bend and RIPA, the 28.8 acres were to be conveyed to three separate nominees: TPI was designated the grantee of a 3.9 acre and 4.6 acre parcel; Coggeshall Development was designated the grantee of an 11.8 acre parcel; and Coggeshall Marina was designated the grantee of an 8.5 acre parcel.

On December 30, 1986, under two separate deeds, RIPA transferred 11.8 acres and 85 acres of the 28.8 acre parcel to Coggeshall Development and Coggeshall Marina, respectively. Both deeds indicate that "[c]onveyance is made SUBJECT TO (i) those reservations, restrictions, easements, covenants and limitations imposed upon the granted premises and upon the rights and easements appurtenant thereto by the [GSA deed]."

Plaintiffs' property is located within the Town of Portsmouth, which does not own or operate a municipal sewage treatment plant. The Navy occupies property adjacent to plaintiffs' property. The sewer line on plaintiffs' property is connected to a sewerline owned by the Navy at the property line that plaintiffs share with the Navy. The Navy's sewer line traverses the Navy's property and ultimately connects at the Newport Treatment Facility (Newport Facility) in Newport.

The sewer line from plaintiffs' property to the Newport Facility extends approximately 6 miles. Because plaintiffs' property is not within the territorial boundary of Newport or Middletown, plaintiffs have no independent right to obtain sewage sevice from the Newport Facility. No municipal sewer system is currently available to directly or indirectly service plaintiffs' properties.

Plaintiffs sought to construct residential condominiums in the Bend Boat Basin property. They requested the Portsmouth Planning Board (Board) to zone a portion of the property for residential use and submitted to the Board a model for their proposed development.[2] The Board invited the Navy to comment on the proposal. The Navy informed the Board that it had imposed a 12,000 gallon per day (gpd) limitation on sewage discharge from the Bend Boat Basin area into the Navy's sewer system, that sewer utilities into the Bend Boat Basin area could support only this existing limitation, and that the Navy's sewer system would not accommodate additional sewage service from the proposed subdivision. GSA subsequently adopted the Navy's position. Plaintiffs, thereupon, requested the Navy and GSA to reconsider this decision and to allow plaintiffs to discharge 72,000 gpd of effluent into the Navy's sewer system. Their request for reconsideration was denied.

Plaintiffs brought suit in the United States District Court for the District of Rhode Island seeking injunctive relief "to enforce the contractual easement rights granted them by the United States in the [GSA deed]." *Coggeshall Dev. Corp.* v. *William J. Diamond, Administrator of General Services Administration*, C.A. No. 88-0448B, slip op. at 13 (D.R.I.

[2] During the period that the 28.8 acre parcel had been owned by Navy and by the Rhode Island Port Authonty (RIPA), it was exempt from the application of the Portsmouth zoning ordinances. When RIPA conveyed the property to plaintiffs, it became subject to the Portsmouth zoning ordinances. At the time that plaintiffs acquired the property, the Portsmouth Town Council had not given the property a particular zoning classification. Transcript (Tr.). at 129.

Dec. 22, 1988). The district court granted judgment in favor of plaintiffs and ordered that the Navy allow plaintiffs to tie into its sewer system for up to plaintiffs' requested total amount of 72,000 gpd of discharge. *Id.* at 17. On appeal, the United States Court of Appeals for the First Circuit vacated the district court's decision after determining that the Claims Court,[3] not the district court, was the proper forum for plaintiffs to litigate their breach of contract claim. *Coggeshall Dev. Corp.* v. *William J. Diamond, Administrator of General Services Administration*, No. 89-1264, slip op. at 10 (1st Cir. Sept. 5, 1989).

On November 13, 1990, plaintiffs filed suit in this court, seeking $25 million in damages against the government for the alleged breach of the GSA deed covenant. Defendant filed a motion on January 11, 1991, to dismiss the action for failure to state a claim upon which this court could grant relief. Defendant averred that plaintiffs lacked standing to sue the government for breach of the GSA deed covenant.

On August 22, 1991, the court denied defendant's motion to dismiss. *Coggeshall Dev. Corp.* v. *United States*, 23 Cl. Ct. 739 (1991). In its decision, the court held that: (1) plaintiffs have standing to pursue their contract claim in this court because, as successors-in-title to the property that RIPA purchased fom the United States, plaintiffs have a contractual relationship with the United States, and (2) by alleging that the government breached its contract with plaintiffs, plaintiffs have stated a claim upon which this court can grant relief.

On February 25, 1991, plaintiffs filed a motion for summary judgment as to liability in this court. Defendant filed its opposition and cross-motion on February 28, 1992. On February 2, 1993, the court denied plaintiff's motion for summary judgment and defendant's cross-motion for summary

[3] On October 29, 1992, the United States Claims Court was renamed the United States Court of Federal Claims, pursuant to Title IX of the Federal Courts Administration Act of 1992. Pub. L. No. 102-572 106 Stat. 4506 (1992). The United States Court of Federal Claims is the successor to the United States Claims Court in all respects.

judgment. *Coggeshall Dev. Corp.* v. *United States*, No. 90-3942L, Unpublished Opinion, (Fed. Cl. February 2, 1993). The court held trial on June 7-9, 1993.

Discussion

The dispute in the present case regards the level of sewer service that the Navy must supply to plaintiffs' property under the terms of the GSA deed. The GSA deed is silent on the scope of the Navy's obligation to provide sewer service. Two questions were presented at trial: (1) whether the original parties to the GSA deed - RIPA and GSA[4] — intended the GSA deed to be a final, integrated document; and (2) if RIPA and GSA did not intend the GSA deed to be a final, integrated document, then what terms did RIPA and GSA intend to read into the GSA deed regarding the amount of sewage that the Navy was to allow RIPA and its successors-in-title to discharge into the Navy's sewer system. *See Coggeshall Dev. Corp.* v. *United Sates*, No. 90-3942L Unpublished Order (Fed. Cl. Feb. 19, 1993).

1. *GSA Deed's Completeness*

Defendant maintains that the GSA deed is incomplete because it fails to address how much sewage service that the Navy must provide to RIPA's property. Defendant alleges that, prior to executing the GSA deed, RIPA, GSA, and the Navy orally agreed to limit effluent discharge from RIPA's property into the Navy's sewer system to 12,000 gpd. Defendant concludes that this extrinsic agreement shows that the parties did not intend the GSA deed to completely encompass their agreement. Plaintiffs, on the other hand, contend that

[4] In its February 2, 1993, Opinion denying summary judgment, the court stated that the original parties to the GSA deed were RIPA and Navy, not RIPA and GSA. *Coggeshall*, No. 90-3942L, slip op. at 6. The Navy's intentions regarding the provision of sewer service to the 28.8 acre parcel were critical, because the Navy continued to own and operate the sewer system that RIPA and its successors-in-title contracted to use. Nevertheless, the court recognizes that only GSA, not the Navy, is named as the property's grantor in the deed with RIPA.

the GSA deed is complete. They allege that RIPA and GSA did not include a specific sewage discharge limit in the GSA deed because the Navy intended to grant RIPA and its successors-in-title an easement of unlimited reasonable use.

In determining whether RIPA and GSA intended the GSA deed to be a final, integrated document, the court may consider both the document itself and evidence extrinsic to the writing, incuding the circumstances surrounding the document's execution, including the parties' negotiations preceding the document's execution and the parties' conduct subsequent to the agreement's formation. *David Nassif Assocs.* v. *United States*, 214 Ct. Cl. 407, 420 (1977); *Sylvania Elec. Prod, Inc.* v. *United States*, 198 Ct. Cl. 106, 128 (1972); *Friends of the Sakonnet* v. *Dutra*, 749 F. Supp. 381, 389 (D.R.I. 1990); *Robidoux* v. *Pelletier*, 391 A.2d 1150 (R.I. 1978); *Waterman* v. *Waterman*, 175 A.2d 291, 294 (RI. 1961).[5]

Based on the documentary and testimonial evidence presented at trial, the court finds that the GSA deed is not a final, integrated document with regard to the level of sewer service that the Navy must provide to RIPA and its successors-in-title. The evidence shows that the parties had agreed that the Navy would provide a specific amount of sewer service to the 28.8 acre parcel, and that the parties neglected to include the terms of this agreement in the GSA deed.

Representatives of both RIPA and the Navy testified that they specifically had discussed with GSA and Bend officials the quantity of sewer service that the Navy would supply to the 28.8 acre parcel, and that they had agreed to include these provisions in a service agreement separate from the GSA deed. Captain George Smith, who was the Public Works Officer at the Naval Education and Training Center in Newport, Rhode Island, at the time that the GSA deed was negotiated and

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[5] Because the property at issue is located in the State of Rhode Island, and because Rhode Island law conforms to the general law of easements, Rhode Island law is persuasive in the instant case. *See Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 155 (1944); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 297 (1941); *Foster* v. *United States*, 221 Ct. Cl. 412, 420-21 (1979).

executed, testified that "the service agreement would have been a document that talks about rates and a period of time, quantities and billing period, duration" (Tr. at 456), and that this agreement was "discuss[ed] at one of the meetings [the Navy] had with RIPA, GSA and the Bend people . . ." Tr. at 495. Virgil Nolan, who was Deputy Director of Finance and Administration for RIPA at the time that the GSA deed was negotiated and executed, testified that during the negotiations, RIPA "discussed sewer services and the lack thereof [with GSA]" and advised that [RIPA] would have to . . . make [its] own arrangements for sewer services or [RIPA] would have to work with, through the Navy for sewer services." Tr. at 598. Mr. Nolan explained that he was aware of the parties' agreement to limit effluent discharge from RIPA's property into the Navy's sewer system and testified that he "assumed that [the limitation] was going to be covered by the service agreement." Tr. at 604.

Both Captain Smith and Mr. Nolan suggested that the parties inadvertently may have omitted the service agreement from the GSA deed. When asked why the service agreement was not made part of the GSA deed, Mr. Nolan admitted that he did not know. Tr. at 604. Captain Smith testified that "a utilities agreement [is] normal between the Navy and a third party. . . . In discussions it was commented a document would be accompanying the sale. Whatever happened to it, I don't know. There should have been." Tr. at 495-96.

Melvin Zurier, Bend's attorney at the time the GSA deed was negotiated and executed, also acknowledged at trial that RIPA and Navy agreed to prepare a separate service agreement covering the Navy's sewer services to RIPA's property, and that the parties intended several different documents to address sewer service and other related issues:

> Q: You state in your memorandum, again Government's Exhibit 5, that . . . "It was agreed that Vaccaro would attach a proposed service agreement to the sales agreement which would cover this . . . ."

A: I would assume that it was intended that there would be some other document. Or, Mr. Vaccaro said that he anticipated that there would be some other document ....

Tr. at 529:13-23; 530:1-4.

....

Q: So in other words you expected several documents to be involved in connection with these issues?

A: Yes. ... These were just discussions that were taking place as to what would go into the documents later on at that time.

Tr. at 544:22-25; 545:1-2.

Three separate documents prepared by Mr. Zurier also support the conclusion that the GSA deed was not complete regarding sewer service. In a memorandum of a January 1976, meeting among representatives of RIPA, GSA, Bend, and the Navy, Mr. Zurier writes:

It was agreed that ... the Navy would handle through its sewer line up to 12,000 gallons per day.... It was agreed that [Pat] Vaccaro [of GSA] would attach a proposed service agreement to the sales agreement which would cover this ....

Defendant's Exhibit (Ex.) 5.

In a memorandum of a December 1976, meeting among representatives of RIPA, GSA, Bend, the Conservation Law Foundation, and the Army Corps of Engineers (Corps), Mr. Zurier states:

Vaccaro noted that under the deed from GSA to [RIPA], there would be an undertaking by GSA to provide 12,000 gpd] by the United States Government to [RIPA] and this will appear in the deed itself.

Defendant's Ex. 39.

Finally, in a January 25, 1977, letter that he wrote to the Corps in response to the Corps' inquiry concerning the impact that Bend's proposed development would have upon various municipal services, Mr. Zurier explains:

> Sewerage-Reference is again made to paragraph 3 on page 14 of the Assessment and Negative Determination, the proposed deed from the United States Government and the enclosed letter of Captain G.L Smith, Director for Public Works of the Naval Education and Training Center in Newport dated 6 January 1977.

Defendant's EX. 8.

The January 6, 1977, letter from Captain Smith, to which Mr. Zurier's letter referred, states:

> The Navy is willing to accept 12,000 gallons per day of sewerage from the Melville, North area which will include sewage from Bend Inc. facilities as well as from any other facilities that may be located in the Melville area.

Id.

By referencing documents other than the GSA deed itself to explain the sewer service provisions for the 28.8 acre parcel, Mr. Zurier's letter suggests that the GSA deed was not a complete expression of the parties' intent regarding sewer service.

Plaintiffs argue that RIPA and GSA did not include a specific sewage discharge limit in the GSA deed because the Navy intended to grant RIPA and its successors-in-title an easement of unlimited reasonable use. Plaintiffs contend that "where [an] easement is created by grant and is not limited in its scope by the terms of the grant, it is available for the reasonable uses to which the dominant estate may be devoted." *Friends of the Sakonnet* v. *Dutra*, 749 F. Supp. 381, 389 (D.R.I. 1990) (*quoting Sharp* v. *Silva Relaty Corp.*, 135 A.2d 131, 136 (RI 1957)).

In resolving the instant dispute, thc court's objective is to interpret the GSA deed consistent with the intent of the original contracting parties. *Beta Sys., Inc.* v. *Unted States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988); *Firestone Tire & Rubber Co.* v. *United States*, 195 Ct. Cl. 21, 30 (1971). The court will not read a reasonableness standard into the GSA deed's sewer service provision if doing so would conflict with the parties' original agreement. *See Beta Systems*, 838 F.2d at

1185; *Sakonnet*, 749 F. Supp. at 390; *Vallone* v. *City of Cranston, Dep't of Pub. Works*, 197 A.2d 310, 317 (R.I. 1964).

The evidence that plaintiffs submit fails to support their proposition that the parties intended a reasonableness standard to govern the level of sewer service available to the property at issue. While six of plaintiffs' witnesses testified that they were unaware of any agreements to limit sewage discharge into the Navy's sewer system, none of these witnesses were parties to the original GSA deed. Tr. at 54, 64, 65, 132, 133, 142, 212, 213, 304, 337, 523. Morever, of plaintiffs three witnesses who were present during any of the GSA deed's negotiations, one witness could not remember the relevant details of the meetings,[6] the second witness admitted that he had no personal knowledge of the parties' intentions regarding sewer service,[7] and the third witness' testimony tends to sup-

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[6] Martin Temkin was a partner at Temkin, Meroula and Zurier, a law firm that represented Bend during the GSA deed's negotiations. Tr. at 24. Mr. Temkin testified:

> Q: And do you remember what discussions there were [between GSA and RIPA]?
>
> A: I can't give you the details of the discussions, frankly, at this late juncture, no.

Tr. at 38:17-18.

> . . .
>
> Q: Well, would it surprise you if you had said during the deposition in response to the question of "Do you recall the substance of whatever discussions you may have had with the GSA officials?" and your answer was "I do not"?
>
> A: It's possible.

Tr. at 92:10-14.

> Moreover, Mr. Temkin testified that he could not recall ever stating to any representatives from either RIPA, GSA,or the Navy that he understood that 12,000 gpd was not a limitation on Bend's use of the Navy's sewer system. Tr. at 105, 106, 107.

[7] Daniel Varin was Secretary of the Rhode Island State Planning Council during the GSA deed's negotiations. Tr. at 295. Mr. Vann testified:

> Q: [Would it be fair to say that you have no personal knowledge with respect to what [RIPA] and the . . . Navy agreed with respect to the quantity of sewage that would be provided to this parcel, correct?
>
> A: Yes.

Tr. at 315:19-24.

port the finding that the parties agreed that the Navy would provide only a specified level of sewer service to the 28.8 acre parcel.[8]

Plaintiffs' suggestion that a reasonableness standard governs the level of sewer service available to plaintiffs' property also conflicts with the construction of the GSA deed itself. Throughout the GSA deed, the parties clearly specify when the reasonableness standard applies to a particular provision.[9] Indeed, Mr. Zurier's testimony suggests that the parties understood that a reasonableness standard would not govern any provision absent GSA's explicit accession:

> Q: And there's a reference to the use of a reasonableness standard in determining the time in order to obtain public utilities service?
>
> . . . .
>
> A: Yes.
>
> Q: And do you know how, at whose request, that provision appeared in the deed?
>
> A: Yes . . . in our discussions.

Tr. at 547: 13, 21-5; 548:1-2.

. . . .

---

[8] Melvin Zurier, was a partner at Temkin, Meroula and Zurier during the GSA deed's negotiations. Tr. at 500. Mr. Zurier testified:

> Q: Now, you also say it was agreed, it was agreed that based on [the Navy's study of its sewer system's capacity] the Navy would handle through its sewer line up to 12,000 gallons per day. . . . What did you mean when you said it was agreed by the parties?
>
> A: That the Navy had indicated its willingness and this was satisfactory to the other parties involved to handle through its sewer line up to 12,000 gallons per day.
>
> Q: And why did you use the words "up to" 12,000 gallons per day?
>
> A: The discussion at the meeting indicated that the Navy was willing to handle up to 12,000 gallons a day . . . .

Tr. at 522:7.9, 17-21; 523:1-4. *See generally*, Tr. at 520-45.

[9] The GSA deed provides, for example, that the grantee is conveyed "the right to erect a *reasonable* number of signs, consistent with *reasonable* safety requirements . . . ." and that the grantee "shall be allowed a reasonable time to obtain . . . public utility water service . . . ." Plaintiff's Ex. A [emphasis added.]

Q: In fact, you asked the GSA to put in a reasonableness standard the method of determining the pro-rata costs of the use of the utility?

A: The pro-rata cost, yes.

Q: And that request was, was that approved or rejected by the —

A: I believe that was rejected . . . .

Tr. at 549:19-25.

Plaintiffs have failed to adduce sufficient evidence, however, showing that the parties even suggested that the Navy would provide a reasonable level of sewer service to RIPA's property.[10]

2. *Terms of Extrinsic Agreement*

Because the court finds that the GSA deed is not a final, integrated document regarding the level of sewer service that the Navy must provide to the property at issue, the court must determine what terms govern sewer service. Defendant argues that GSA, RIPA, and the Navy agreed that the Navy would allow RIPA and its successors-in-title to discharge up to 12,000 gpd of effluent into the Navy's sewer system, and that the Navy would have to authorize any increases in this level of sewer service. Plaintiff contends that the 12,000 gpd figure simply represented Bend's estimated effluent discharge at the time, and that the parties did not intend this figure to represent an upper limit on the amount of effluent that the Navy was willing to accept.

The evidence establishes that the parties to the GSA deed agreed that RIPA and its successors-in-title would be limited to discharging up to 12,000 gpd of effluent into the Navy's sewer system, and that the Navy had the authority to approve or deny any increases in this limit. Mr. Nolan testified that,

[10] Mr. Zurier admitted that he had no recollection of telling any GSA representative that he understood a reasonableness standard would govern the level of sewer service available to the property at issue, nor could he recall even asking GSA to include a reasonableness standard for sewer service. Tr. at 546, 550.

as the agent appointed by RIPA to negotiate the purchase of the 28.8 acre parcel from the United States, he understood that the Navy would acccept no more than 12,000 gpd of effluent from RIPA's property, and that the Navy retained absolute discretion to determine whether it might increase the amount of service to be provided:

> Q: Okay and looking at the first paragraph of that document [Defendant's ex. 31] it says, quote, "The Navy will permit 12,000 gallons per day of effluent to their system. If Bend, Inc. has need for additional effluent, Navy will have to judge the request in relation to Navy capacity." Yes?
>
> A: Yes.
>
> Q: Do you recall a conversation in which that statement was made?
>
> A: I do indeed. Captain Smith sat at his desk . . . and informed us this was the limitation of what we could have in the way of sewers.

Tr. at 580:14-24.

Mr. Nolan confirmed his understanding of the Navy's intentions in his December 1975, letter to John R. Fales, Sr., President of Bend, wherein he states that—

> You will be limited to a 12,000 gallon per day input into thc [Navy's sewer] system. If you have additional sewage handling requirements, we need to know the amount of such requirements and the approximate dates you will need the expanded service. It is possible that additional service will be available through the Navy System; however, your requirements must be projected into a study being performed by the Navy.

Defendant's Ex. 4.

Captain Smith's testimony further supports the court's findings. Captain Smith testified that, as the Public Works Officer responsible for managing and disposing of utility services at the Naval base in Newport, he concluded that the Navy would provide no more than 12,000 gpd of sewer service to RIPA's property, that this 12,000 gpd limitation was

binding both upon RIPA and its successors-in-title, and that any request for an increase in this limit would have to be submitted to and approved by the Navy:

> Q: Was this [12,000 gpd] limitation applicable only to that deed, or to the successors-in-title also?
>
> A: This limitation, it was my understanding and the commanding officer's understanding at the time, was that this amount needed to be connected at the [Bend] boat basin area for the disposition of the property.
>
> . . . .
>
> Q: But did [the 12,000 gpd limitation] apply to the successors[-in-title] also?
>
> A: Yes, that was . . . for that 28.8 acres.

Tr. at 493:3-17.

> . . .
>
> Q: Were there any limitations regarding your authority concerning the sale of utility services?
>
> . . . .
>
> A: In the sale of utilities I was governed of course by the Navy regulations and instructions . . . .

Tr. at 484:21-25; 485:2-4.

> . . . .
>
> Q: If there was need for an increase, how was that going to be handled?
>
> A: It would have been by understanding that a request would have come in that would have been evaluated based on the criteria that we went through before.
>
> . . . .
>
> Q: [B]asically which entity had to act on this increase?
>
> A: If there was a request for an increase someone would have to come to the Navy and ask for an increase.

Tr. at 494:18-23; 495:10-14. *See generally* Tr. at 466-77; 487-88.

Captain Smith further testified that he communicated the Navy's position to RIPA and GSA, and that both agencies accepted the Navy's provisions. Tr. at 493.

The finding that the Navy had the authority to approve or reject any requests for increased sewer service is corroborated by the testimony of Daniel Varin, who represented the State of Rhode Island during the GSA deed's negotiations.[11] Mr. Varin testified that he had contacted Navy officials and that it was his understanding that the Navy was to make the decision whether to provide more that 12,000 gpd of sewer service at any future time:

> Q: And, in addition, did you come to any conclusion based upon the reports, regarding future use of the system?
>
> A: We concluded that any future uses would have to be reviewed at the time that they became sufficiently specific to make an estimate of their sewage effluent discharge.

Tr. at 303:21-25.

. . . .

> Q: Would it be fair to say, then, from that statement, that you understood whether any additional effluent would be permitted by the Navy would be reviewed by the Navy?
>
> A: Yes.

Tr. at 311:15-19.

> Q: [Y]ou did state that there would be an allowed 12,000 gallons per day, unless the Navy, after review, should deny heavier flows through their system?
>
> A: Yes.
>
> Q: So, it was the discretion of the Navy, it was your understanding, was it not, that it was the Navy which had the discretion to deny heavier flows through its system?
>
> A: Yes.

Tr. at 317:19-25;318:1

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[11] Daniel Varin was Secretary of the Rhode Island State Planning Council during the GSA deed's negotiations. Tr. at 295. While Mr. Varin's agency, the Rhode Island State Planning Council, was not a party to the GSA deed, Mr. Varin's testimony is relevant to the extent that it reflects the Navy's intentions regarding sewer service for the property at issue.

. . . .

Q: Now, looking at the second paragraph of [defendant's Ex. 41 it says, sewage service at the small boat basin will be handled through the Navy system. You will be limited to a 12,000 gallon per day input into the system. Do you recall what your source was for making those two sentences?

A: Captain Smith informed us that was the maximum amount that we could put into the system.

Tr. at 583:21-25; 584:1-3.

. . . .

Q: Do you remember who told you that you would be limited to 12,000 gallons per day?

A: Yes, Captain Smith.

Tr. at 589:16-18.

. . . .

Q: Do you recall what was discussed at [a 1986 meeting with Bend's principals] when the topic of accelerating the option [to buy the property] was addressed?

A: I first reminded them of the 12,000 gallon a day limitation on the [sewer] service.

Tr. at 600:3-7.

Mr. Varin's testimony is supported by his May 1976, memorandum to the State Planning Council, in which he explains that—

> The Navy will allow 12,000 gallons per day of effluent through their collection system at this time and additional future needs will be reviewed. The Rhode Island Department of Health feels that effluent estimates . . . are not likely to pose a problem even if they exceed the allowed 12,000 gallons per day unless the Navy, after review, should deny heavier flows through their system.

Defendant's Ex. 19.

Finally, a variety of additional documents support the court's conclusion that the parties to the GSA deed agreed that RIPA and its successors-in-title would be limited to dis-

charging up to 12,000 gpd of effluent into the Navy's sewer system and that the Navy would have to authorize any limitation increases.[12]

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[12] A December 10, 1975, interoffice memorandum from Charles Vernon to Mr. Nolan at RIPA explains that:

> The Navy will permit 12,000 gallons per day of effluent to their system. If Bend, Inc. has need for additional effluent, Navy will have to judge the request in relation to Navy capacity.

Defendant's Ex 3.

A January 3, 1977, letter from Edward Spinard (Rhode Island Department of Economic Development) to Captain Howard Kay (Navy) states:

> It would ... be helpful to [the Army Corps of Engineers] evaluation if you could furnish us the following information:
>
> Documentation that the Navy is willing to accept 12,000 gallons per day of sewerages from Bend, Inc ....

Defendant's Ex. 6.

A January 6, 1977, letter from Captain George Smith (Navy) to Edward Spinard indicates that:

> The Navy is willing to accept 12,000 gallons per day of sewerage from the Melville, North area which will include sewage from Bend, Inc. facilities as well as from any other facilities that may be located in the Melville area.

Defendant's Ex. 7.

A January 25, 1977, letter from Melvin Zurier to Kenneth Jackson (Army Corps of Engineers) explains:

> Sewerage-Reference is again made to ... the enclosed letter of Captain G.L. Smith ... dated 6 January 1977 [defendant's Ex.7].

Defendant's Ex. 8.

A May 11, 1977, Army Corps of Engineers § 403 Development Permit issued to Bend indicates:

> The Navy will allow 12,000 gallons per day through their collection system.

Defendant's Ex. 9.

A March 18, 1980, letter from Captain G.E. Pillow (Navy) to RIPA explains:

> When the Bend Boat Basin Development at Melville was in the planning stage, the Navy agreed to provide ... limited sewer service to the development through the Navy-owned utility systems .... As part of the agreement to receive 12,00 gallons per day of sewage from the boat basin area into the Navy system, Bend agreed ....

Defendant's Ex. 13.

A March 19, 1980, letter from Virgil Nolan to J.R. Fales (Bend)) states:

> Enclosed is a letter from Captain Pillow [Defendant's Ex. 13] complaining about your failure to comply with the terms of the agreement covering water and sewer services provided by the Navy.

3. *Defendant's Liability*

Plaintiffs argue that, even if the parties to the GSA deed agreed to limit effluent discharge into the Navy's sewer system to 12,000 gpd, defendant still is liable for plaintiffs' alleged losses. Plaintiffs contend that neither GSA nor the Navy has the authority to restrict the use of surplus land. *Conservation Law Found. of New England Inc.* v. *General Serv. Admin.*, 707 F.2d 626, 630 (1st Cir. 1983); *Conservation Law Found.* v. *Kline*, 16 Env't Rep. Case (BNA) 1985, 1993 (D.RI. 1981). By declining to accept more than 12,000 gpd of effluent from plaintiffs' 28.8 acre parcel, however, the Navy has not limited plaintiffs' use of their property. Rather, the Navy has restricted plaintiffs' use of the sewer system adjacent to plaintiffs' land, which the Navy still owns and operates.[13] Pursuant to 10 U.S.C §2481(a)(1988), the Navy has the authority to control the sewage service that it provides to plaintiffs' property.[14]

Defendant's Ex. 12.

Finally, a May 6, 1976, letter from James Robertson (Rhode Island Department of Economic Development) to Daniel Varin indicates:

> The Navy will allow, at this time, 12,000 gallons per day of effluent to their system. Additional need will be reviewed by the Navy.

Defendant's Ex.34.

[13] Joint Stipulation of Facts at 6, para. 17 (Fed. Cl. filed May 19, 1993).

[14] Section 2481(a) of 10 U.S.C. provides that—

> Under such regulations and for such periods and at such prices as he may prescribe, the Secretary concerned or his designee may sell or contract to sell purchasers within or in the immediate vicinity of an activity of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, any of the following utilities and related services, if it is determined that they are not available from another local source and that the sale is in the interest of national defense or in the public interest:
>
> . . . (5) Sewage and garbage disposal.

Section 2481(a) is implemented by instructions promulgated by the Secretary of the Navy, which were effective at the time that GSA sold the 28.8-acre parcel to RIPA and at the time that plaintiffs acquired the property. These instructions provide that—

> It is the policy of the Department of thc Navy to limit the extension of utilities services to private parties to only those instances where the statutory requirements are met and where the supply of such services will not interfere with the mission of the activity.

Plaintiffs have not shown that either the Navy's 1978 determination to limit sewer service to 12,000 gpd, or the Navy's 1988 decision that the Navy would not provide additional sewer service was arbitrary, capricious, or an abuse of the Navy's discretion.[15] *See* Plaintiff's Ex. P.

In the alternative, plaintiffs argue that the 12,000 gpd limitation should not be binding upon them because this limitation is not referenced in their chain of title to the property at issue. The court disagrees. First, as the assignee of RIPA and Bend, plaintiffs' right to use the Navy sewer system cannot exceed that of RIPA, its assignor. *See Unity Bank & Trust Co.* v. *United States*, 5 Cl. Ct. 380, 384 (1984) *aff'd*, 756 F.2d 870 (Fed,. Cir. 1985); *Produce Factors Corp.* v. *United States*, 199 Ct. Cl. 572, 582 (1972); *Nat'l City Bank of Evansville* v. *United States*, 143 Ct. Cl. 154, 163 (1958). The evidence presented at trial established that RIPA was aware of, and agreed to, a 12,000 gpd limitation on the effluent that it could discharge into the Navy's sewer system. Thus, plaintiff cannot now recover from defendant for the Navy's refusal to provide more than 12,000 gpd of sewer service.

. . . .

> [A]uthority over matters relating to the sale and furnishing of utilities and related services to purchasers is delegated to the Chief a Naval Operations and Commandant of the Marine Corps to act for the Secretary in all matters relating thereto.

SECNAVINST 11300.1A (March 1, 1971). Defendant's ex. 30. A similar provision appears in the Navy Comptroller Manual § 035875(2)(e), which also was in effect when GSA sold the property to RIPA and when plaintiffs acquired the property. Defendant's ex 32. *See also*, Tr. at 448, 466-77, 487-88.

[15] Both plaintiffs' and defendant's experts testified that the Navy's existing sewer system cannot accommodate plaintiff's requested discharge of 72,000 gpd. Tr. at 276, 408, 412. Plaintiff contends, however, the Navy's sewer system cannot accept 72,000 gpd of effluent because the Navy failed to adequately maintain the system, thereby violating the GSA deed's provision that the Navy "will maintain its sewer mains and appurtenances which connect the sewer lines in the fee area to the City of Newport's public sewer system." Contrary to plaintiffs' contention, however, the testimony of both experts shows that, regardless of any repairs that are made, the Navy's sewer system could accommodate 72,000 gpd of discharge only if the Navy upgraded the system's design, which the GSA deed does not obligate the Navy to do. Tr. at 249, 250, 251, 408, 409, 412.

Moreover, it is a well-established proposition in this court that [w]hen a contractor is faced with an obvious omission . . . of significance, he is obligated to bring the situation to the government's attention if he intends subsequently to resolve the issue in his own favor. *Space Corp.* v. *United States*, 200 Ct. Cl. 1, 5-6 (1972). *See also*, *Beacon Constr. Co.* v. *United States*, 161 Ct. Cl. 1, 6-7 (1963). Indeed, the contractor should "make certain that the omission was deliberate, if he intends to take advantage of it." *James A. Mann, Inc.* v. *United States*, 210 Ct.Cl.104, 122-23 (1976) (*quoting Ring Constr. Corp.* v. *United States*, 142 Ct.Cl. 731, 734 (1958)).[16]

In the instant case, plaintiffs were faced with an obvious omission of significance and failed to address it before purchasing the property. The GSA deed lacks any provision whatsoever regarding the level of sewer service that the Navy must provide to the 28.8 acre parcel. Sewer service, however, was an issue sufficiently important to obligate plaintiffs to investigate before purchasing the property. *See Max Drill, Inc.* v. *United States*, 192 Ct.Cl. 608, 625 (1970).

Plaintiffs had ample notice that sewer service was an important issue needing clarification. The Portsmouth Zoning Ordinance (Ordinance) advised that the Zoning Board of Review would not approve any proposed development unless "the sewer line(s) to which it shall be connected, have adequate capacity, to carry the additional effluent created by the development." Defendant's Ex: 21. Thomas McLaughlin, president of Coggeshall Development and Coggeshall Marina, testified that he was familiar with the Ordinance before purchasing the property. Tr. at 173. He acknowledged the significance of sewer service by testifying that he purchased the property solely in order to develop it for residential use, which was contingent upon the availability of adequate sewer service. Tr. at 148.

In addition to the Ordinance, Mr. McLaughlin's architects

[16] These rules also apply in the instant case, where plaintiffs' property rights under the GSA deed are entirely derivative of RIPA's rights.

also alerted him to the significance of, and need to define, sewer service terms for the 28.8 acre parcel. On December 16, 1986, two weeks before purchasing the property, Mr. McLaughlin wrote to his architects to request their review of the Portsmouth Zoning Ordinances. Defendant's Ex. 15; Tr. at 160, 200. James McQueen, representing plaintiffs' architects, responded in a letter dated December 22, 1986, in which he indicated that an issue remained regarding sewer service available to the property. Specifically, Mr. McQueen stated that—

> [I]t is unclear to us whether the Navy sewer is considered an onsite or offsite system .... We will require ... clarification of the type and extent of the navy sewer in order to determine the total number of units that may be built on the site.

Defendant's Ex. 16.[17]

Finally, the sublease between Bend and TPI should have notified Mr. McLaughlin that sewer service to the 28.8 acre parcel may be limited. The section of the sublease entitled "Utilities and Other Charges" provides:

> Bend will at its expense cause ... sewer service to be delivered to the exterior of Building 117. If the Sewage capacity available to the parcel shall not be sufficient to service the needs of TPI and other occupants of the parcel, the parties agree that BEND may limit the capacity utilized by TPI to an amount reasonably proportionate to the overall requirements of the parcel.

The mortgage between Bend and Coggeshall Development, executed on December 5, 1986, stated specifically that it was subject to the sublease between Bend and TPI. Defendant's Ex. 18. The Bend-TPI sublease was on record at the Ports-

[17] Mr. McLaughlin testified that he was uncertain whether he received Mr. McQueen's letter before or after the closing. Tr. at 163. Nevertheless, his agent — Mr. McQueen — had knowledge of the need to ascertain the level of sewer sevice available through the Navy in order to determine the property's development potential.

mouth Records of Land Evidence,[18] in plaintiff's chain of title and in plaintiffs' possession before plaintiffs purchased the property. Tr. at 153, 154, 229.

Despite these notices, neither Mr. McLaughlin nor any of his agents made any inquiry to RIPA, GSA, Bend, or the Navy regarding either the adequacy of Navy's sewer system or the level of service that the Navy was willing to provide before purchasing the property.[19] A prudent real estate developer like Mr. McLaughlin,[20] intending to develop a large condominium complex and aware that sewer service is provided by an active military installation, should have made such an inquiry. *See, e.g., P. J. Maffei Bldg. Wrecking Corp.* v. *United States*, 732 F.2d 913, 917 (Fed. Cir. 1984); *H. N. Bailey & Assocs.* v. *United States*, 196 Ct. Cl. 156, 163 (1971).[22] His failure to do so now bars his companies from recovering damages related to this missing contract term. *See Flexible Metal Hose Mfg. Co.* v. *United States*, 4 Ct. Cl. 522, 528-29 (1984), *aff'd*, 765 F.2d 156 (Fed. Cir. 1985); *Johnson Controls, Inc* v. *United*

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[18] Joint Stipulation of Facts at 4, para. 9 (Fed. Cl. filed May 19, 1993).

[19] In his testimony, Mr. McLaughlin stated that neither RIPA, the United States Government, nor Bend had advised him that there was any limitation on the use of the Navy sewer system. Tr. at 133, 196. He later testified, however, that he never asked these entities whether any limitation existed before purchasing the property. Tr. at 158, 163, 175, 176, 180, 198.

[20] Mr. McLaughlin testified that he had worked exclusively and extensively in real estate development from the time that he earned his Master of Business Administration in 1977 to the time that he purchased the property at issue in 1986. Tr. at 119.

[21] In his testimony, Mr. McLaughlin explained that he had dealt with the acquisition of utility services in former development projects, that he knew that the Navy owned the sewer system that would be servicing the property, and that this was the first time he was involved in a development plan requiring the services of the Navy. Tr. at 178, 162.

[22] In addition, available on public record were a number of documents indicating that the Navy would allow only 12,000 gpd of effluent discharge into its sewer system from the property at issue, and that the Navy must authorize any increases in this discharge limit. *See, e.g.*, defendant's Ex. 3, 7, 13, 19, 34.

States, 229 Ct. Cl. 445, 459 (1982); *Jefferson Constr. Co.* v. *United States*, 151 Ct. Cl. 75, 89-91 (1960); *G.M. Shupe, Inc.* v. *United States*, 5 Ct. Cl. 662, 705 (1984). Thus, the court finds that the Navy did not violate the GSA deed by refusing to provide plaintiffs a level of sewer service in excess of 12,000 gpd.

Conclusion

For the reasons stated above, the court finds that defendant did not breach its contract with plaintiff. Accordingly, the Clerk is directed to enter judgment in favor of defendant. No costs.

s/BOHDAN A. FUTEY
BOHDAN A. FUTEY
Judge

In the United States Court of Federal Claims

No. 90-3942L

(Filed September 16, 1993)

COGGESHALL DEVELOPMENT CORP. and COGGESHALL MARINA, INC., PLAINTIFFS, v. *THE UNITED STATES*, DEFENDANT.	* Government contracts; * Fully integrated v. * incomplete documents; * Parol evidence; Assignee's * rights; Duty to investigate obvious omissions

ERRATA

Please change paragraph 2 of the Opinion in the above case filed on September 1, 1993 to read as follows:

Andrew M. Eschen, Washington, D.C., with whom was *Assistant Attorney General Richard B. Stewart*, for defendant. *Anthony M. Dowdle*, Department of the Navy, of counsel.

s/BOHDAN A. FUTEY
BOHDAN A. FUTEY
Judge

This opinion/order will not be published in the Federal Claims Reporter because it does not add significantly to the body of law and is not of widespread interest.

In the United States Court of Federal Claims

No. 90-3942L

(Filed February 2, 1993)

***

Factual Background

This case first came before the court[1] on November 13, 1990. On August 22, 1991, the court issued an Opinion denying defendant's motion to dismiss. *Coggeshall Dev. Corp. v. United States*, 23 Cl. Ct. 739 (1991). Because that Opinion includes a full statement of the facts of the case, this Opinion provides only an overview of the facts as they affect the issue now under consideration.

Plaintiffs, Coggeshall Development Corporation and Coggeshall Marina, Inc., are Rhode Island business corporations. Defendant is the United States, acting through its agent, the United States Navy (Navy). The deed at issue concerns real property in Rhode Island that has changed hands several times and to which plaintiffs are the current successors-in-title.

In 1974, the Navy declared certain real property, located in nearby Portsmouth, Rhode Island, excess to its needs and transferred the property to the General Services Administration (GSA) for disposition. GSA subsequently determined that the land was surplus to the needs of the United States and offered to sell it to the Rhode Island Port Authority and Economic Development Corporation (RIPA), an agency of the State of Rhode Island created to acquire surplus land of the United States for economic development purposes.[2] On February 13, 1978, GSA conveyed to RIPA two parcels of its surplus property totalling approximately 28.8 acres. The deed from GSA to RIPA (GSA deed) provides, in relevant part, that:

> [T]he UNITED STATES OF AMERICA, acting by and through the ADMINISTRATOR OF GENERAL SERVICES, under and pursuant to the powers and authority contained in the provisions of the Federal

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[1] On October 29, 1992, the United States Claims Court was renamed the United States Court of Federal Claims, pursuant to Title IX of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992). The United States Court of Federal Claims is the successor to the United States Claims Court in all respects.

[2] R.I. Gen. Laws § 42-64-1 (1991).

> Property and Administrative Services Act of 1949 . . . as amended . . . grants to the RHODE ISLAND PORT AUTHORITY AND ECONOMIC DEVELOPMENT CORPORATION . . . . two certain parcels of land . . . shown as Parcel 1 and Parcel 2 on a Plan attached hereto and made a Part hereof, entitled "BEND, INC. BOAT BASIN MELVILLE PORTSMOUTH RHODE ISLAND . . . . The Grantor hereby grants to Grantee all sewer lines located within said Parcels 1 and 2, along with the perpetual and assignable right to connect at the boundary of Grantee's property with certain sewer mains owned by Grantor and located on other land of Grantor. Grantor covenants that it will maintain its sewer mains and appurtenances which connect sewer lines in the fee area to the City of Newport's public sewer system. The Grantee by acceptance of this Deed covenants that it shall pay the pro-rata costs (based on use) of maintaining Grantor's connecting system resulting from Grantee's use thereof, direct charges assessed to Grantee by the furnishing utility or entity; provided that Grantor's obligation to maintain the same shall terminate at such time as such sewer service shall become available to Grantee by a public utility, without utilizing sewer lines then owned by Grantor; and provided that Grantee's obligation to pay the pro rata costs of maintaining Grantor's connecting sewer system shall terminate upon Grantee obtaining such public utility service. Grantee shall be allowed a reasonable time to obtain such public utility sewer service after same shall become available."

In addition, the GSA deed states the following with respect to successors-in title and subsequent assignment by RIPA:

> Wherever in this Deed reference is made to the Grantor or Grantee, the same shall be read and construed so as to include the successor in title and assigns of both Grantor and Grantee, as well as any person, firm or entity claiming by, through or under said Grantor or

Grantee, and their respective successors in title and assigns.

All covenants and agreements as are herein contained in this Deed, whether made by Grantor or Grantee, shall be deemed and shall constitute covenants running with the land, and shall be binding upon the successors in title and assigns of both Grantor and Grantee, and those claiming by, through or under either of them, including without limiting the foregoing generality, estates for a term of years except that the covenants and agreements of the Grantor shall cease to run with the land if the same shall have lapsed as aforesaid. [Emphasis added.]

On December 30, 1986, under two separate deeds, RIPA transferred 11.8 acres and 8.5 acres of the 28.8 acre parcel to Coggeshall Development Corp. and Coggeshall Marina, Inc., respectively. Both deeds indicate that "[c]onveyance is made SUBJECT TO (i) those reservations, restrictions, easements, covenants and limitations imposed upon the granted premises and upon the rights and easements appurtenant thereto by the [GSA deed]."

Plaintiffs' property is located within the Town of Portsmouth, which does not own or operate a municipal sewage treatment plant. The Navy occupies property adjacent to plaintiffs' property. The sewer line from plaintiffs' property is connected to a sewer line owned by the Navy at the property line that plaintiffs share with the Navy. The Navy's sewer line traverses the Navy's property and ultimately connects at the Newport Treatment Facility (Newport Facility) in Newport. The sewer line from plaintiffs' property to the Newport Facility extends for approximately 6 miles. Because plaintiffs' property is not within the territorial boundary of Newport or Middletown, plaintiffs have no independent right to obtain sewage service from the Newport Facility.

Plaintiffs sought to construct residential condominiums in the Bend Boat Basin property. They requested the Portsmouth Planning Board (Planning Board) to zone a portion of the property for residential use and submitted to the Planning Board a model for their proposed development. The Planning

Board invited the Navy to comment on the proposal. The Navy informed the Planning Board that it had imposed a 12,000 gallon per day (gpd) limitation on sewage discharge from the Bend Boat Basin area, that utilities into the Bend Boat Basin area could only support this existing limitation, and that the Navy sewer system would not accommodate additional sewage service from the proposed subdivision. GSA subsequently adopted the Navy's position. Plaintiffs, thereupon, requested the Navy and GSA to reconsider this decision and to allow 72,000 gpd of sewage discharge. Their request for reconsideration was denied.

Plaintiffs brought suit in the United States District Court for the District of Rhode Island seeking injunctive relief "to enforce the contractual easement rights granted them by the United States in the [GSA deed]." *Coggeshall Dev. Corp.* v. *Diamond*, C.A. No. 88 0448B, slip op. at 13 (D.R.I. Dec. 22, 1988). The district court granted judgment in favor of plaintiffs and ordered that the Navy allow plaintiffs to tie into its sewer system for up to plaintiffs' requested total amount of 72,000 gpd of discharge. *Id.* at 17. On appeal, the United States Court of Appeals for the First Circuit vacated the district court's decision after determining that the Claims Court, not the district court, was the proper forum for plaintiffs to litigate their breach of contract claim. *Coggeshall Dev. Corp.* v. *Diamond*, 884 F.2d 1 (1st Cir. 1989).

On November 13, 1990, plaintiffs filed suit in this court, seeking $25 million in damages against the government for the alleged breach of the GSA deed covenant. Defendant filed a motion on January 11, 1991, to dismiss the action for failure to state a claim upon which this court could grant relief. Defendant averred that plaintiffs lacked standing to sue the government for breach of the GSA deed covenant.

On August 22, 1991, this court denied defendant's motion to dismiss. *Coggeshall*, 23 Cl. Ct. at 744. In its decision, this court held that: (1) plaintiffs have standing to pursue their contract claim in this court because, as successors-in-title to the property that RIPA purchased from the United States,

plaintiffs have a contractual relationship with the United States, *id.* at 743; and (2) plaintiffs have stated a claim upon which this court can grant relief. *Id.*

On February 25, 1991, plaintiffs filed a motion for summary judgment as to liability in this court. Defendant filed its opposition and cross-motion on February 28, 1992. This court heard oral arguments on December 10, 1992.

Discussion

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c) (1992); *Anderson* v. *Liberty Lobby, Inc.*, 477 U S. 242, 247 (1986). A fact is "material" if it might significantly affect the outcome of the suit under the governing law. *Id.* at 248. An issue of material fact is "genuine" if the evidence would permit a reasonable jury to return a verdict in favor of the non-moving party. *Id.*

The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986). The court must resolve any doubts about factual issues in favor of the non-moving party. *Matsushita Elec. Indus.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party may discharge its initial burden in two cases. First, if the moving party demonstrates an absence of genuine issues of material fact, then the burden shifts to the non-moving party to show that a genuine factual dispute does exist. *Jamesbury Corp.* v. *Litton Indus. Prod., Inc.*, 839 F.2d 1544, 1548, *cert. denied*, 488 U.S. 828 (1988). Alternatively, if the moving party can show that there is an absence of evidence to support the non-moving party's case, then the burden shifts to the non-moving party to proffer such evidence. *Celotex*, 477 U.S. at 325.

To show that a genuine issue of material fact exists, the non-moving party must do more than merely suggest that there is some "metaphysical doubt" as to the material facts. *Matsu-*

shita, 475 U.S. at 586. Rather, the non-moving party must present specific facts showing that there is a genuine issue for trial upon which a jury could reasonably find for the non-moving party. *Id.* at 587.

To grant either party summary judgment in the present case, the court must determine, as a matter of law, whether the Navy breached the GSA deed by refusing to accept the additional 60,000 gpd of sewage effluent that plaintiffs requested to discharge into the Navy's sewer system. To answer this question, the court must interpret the GSA deed.

The construction of an unambiguous writing is an appropriate matter for summary judgment. *Nat'l. Rural Util. Co-op Fin.Corp.* v. *United States*, 14 Cl. Ct. 130, 136 (1988), *aff'd*, 867 F.2d 1393 (Fed. Cir. 1989); *Kelley* v. *United States*, 19 Cl.Ct. 155, 161 (1989). Where there is a question on a summary judgment motion of a written contract's construction that can be determined by consideration of the contract's plain and unambiguous wording the question is one of law to be resolved by the court. *Nat'l Rural*, 14 Cl. Ct. at 136; *Ceccanti, Inc.* v. *United States*, 6 Cl. Ct. 526, 528 (1984).

Here, however, the contract at issue is missing a term that is material to the outcome of this case. Specifically, the GSA deed fails to indicate the amount of sewage effluent that the grantee or its successors-in-title may discharge into the Navy's sewer system. Thus, in ruling on the parties' summary judgment motions, the court must make at least two determinations. First, the court must decide if a genuine issue of fact exists as to whether the original parties to the GSA deed — RIPA and the Navy — intended the GSA deed to be an exclusive and final expression of their agreement. Second, if the court determines that the GSA deed is incomplete, then the court must determine the original parties' intent regarding the material terms missing from the document.

Summary judgment is inappropriate "if issues are present which involve an inquiry into the state of mind of either of the parties" to a contract. *Burnside-Ott Aviation Training Center, Inc.* v. *United States*, 24 Cl. Ct. 553, 567 (1991). *See*

also, Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *NAFCO Oil and Gas, Inc.* v. *Appleman*, 380 F.2d 323, 325(10th Cir. 1967). While "[c]ontract interpretation, generally, is a matter of law and thus is amendable to decision on summary judgment . . . [a]n inquiry into the contracting parties' intentions, which is a contractual interpretation issue, may require factual findings and a trial by the court." *Favell* v. *United States*, 16 Cl. Ct. 700, 716 (1989).

In the instant case, both parties flatly disagree on the intent of the original parties to the GSA deed. They dispute whether RIPA and the Navy intended the GSA deed to be a completely integrated document. Defendant maintains that the GSA deed is incomplete because it fails to address how much sewage service that the Navy must provide to RIPA's property. Defendant alleges that, prior to executing the GSA deed, RIPA and the Navy orally agreed to limit effluent discharge into the Navy's sewer system to 12,000 gpd. Defendant concludes that this extrinsic agreement shows that the parties did not intend the GSA deed to completely encompass their agreement. Defendant has submitted extrinsic evidence supporting this allegation.[3] Plaintiffs, on the other hand, contend that the GSA deed is complete. They allege that RIPA and the Navy did not include a specific sewage discharge limit in the GSA deed because the Navy intended to grant RIPA and its successors-in-title an easement of unlimited reasonable use.

The court finds that the parties' arguments, together with the evidence that each party has submitted,[4] are sufficient to

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[3] To support its argument, defendant submits affidavits of former Rhode Island Port Authority and Economic Development Corporation (RIPA) and Navy officials involved in the General Services Administration (GSA) deed negotiations, together with letters and memoranda between representatives of RIPA, the Navy, the Army Corps of Engineers, Bend, Inc., Coggeshall Development Corp. and Coggeshall Marina, Inc.

[4] Evidence extrinsic to a writing is admissible to determine whether the parties to that writing "intended their written agreement to be a complete and exclusive statement of all the terms of their agreement." *Sylvania Elec. Prod., Inc.* v. *United States*, 198 Ct. Cl. 106, 128 (1972). *See also, David Nassif Assocs.* v. *United States*, 214 Ct. Cl. 407, 420 (1977); *Design and Prod., Inc.* v. *United States*, 18 Cl. Ct. 168, 195 (1989). *Cf. Erwin* v. *United States*, 19 Cl. Ct. 47, 55 n.4 (1989).

put into issue whether RIPA and the Navy intended the GSA deed to be a final integrated document. Therefore, the court concludes that the parties' intent is a material issue of fact that must be determined at trial. *See Anderson*, 477 U.S. at 256; *Favell*, 16 Cl.Ct. at 716-17; *Montefiore Hospital*, 5 Cl. Ct. at 475. *Cf. Burnside-Ott*, 24 Cl. Ct. at 568.

Conclusion

For the foregoing reasons, the court denies both plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment. The parties are directed to file a joint schedule by March 5, 1993, as to further proceedings in this case, pursuant to RCFC, Appendix G, ¶¶s 11-15.

s/BOHDAN A. FUTEY
BOHDAN A. FUTEY
Judge

In the United States Claims Court

No. 90-3942L

(Filed August 22, 1991)

COGGESHALL DEVELOPMENT CORP. and COGGESHALL MARINA, INC., PLAINTIFFS, v. *THE UNITED STATES*, DEFENDANT.	Contract; Jurisdiction; Deed; Covenant running with land; Successor-in-title; Privity; Money claim v. declaratory relief.

James M. Sloan, III, Providence, Rhode Island, attorney of record for plaintiff. *Christine J. Engustian* and *Gardner, Sawyer, Gates, Sloan & Engustian*, of counsel.

Andrew M. Eschen, Washingon, D.C, with whom was *Assistant Attorney General Richard B. Stewart*, for defendant.

OPINION

FUTEY, *Judge*.

This case is before the court on defendant's motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs are successors-in-title to Navy surplus property, and seek compensation from defendant for the alleged violation of the terms of the original deed. Defendant asserts that plaintiffs' lack standing to bring an action against the government. In the alternative, defendant maintains that plaintiffs essentially request declaratory relief over which this court has no jurisdiction. For the reasons stated below, defendant's motion to dismiss is denied.

Factual Background

On February 13, 1978, the General Services Administration (GSA) conveyed 28.8 acres of land in Portsmouth, Rhode Island, to the Rhode Island Port Authority and Economic Development Corporation (RIPA).[1] The land was surplused by the United States Navy and included a small marina known as Bend Boat Basin. The sewer lines connecting the Bend Boat Basin area to the Newport Sewer plant pass through adjacent property owned by the Navy.

The GSA deed to RIPA stated in part:

> The Grantor hereby grants to Grantee all sewer lines located within said Parcels 1 and 2, along with the *perpetual and assignable right to connect at the boundary of Grantee's property with certain sewer mains owned by Grantor and located on other land of Grantor.* Grantor covenants that it will maintain its sewer mains and appurtenances which connect sewer lines in the fee area to the City of Newport's public sewer system. [Emphasis added.]

In addition, the deed provided the following with respect to successors-in-title and subsequent assignment by RIPA:

> Wherever in this Deed reference is made to the Grantor or Grantee, the same shall be read and construed so as to include the successors in title and assigns of both Grantor and Grantee, as well as any person, firm or entity claiming by, through or under said Grantor or Grantee, and their respective successors in title and assigns.
>
> *All covenants and agreements as are herein contained in this Deed, whether made by Grantor or Grantee, shall be deemed and shall constitute covenants running with the land, and shall be binding upon the successors in title and assigns of both Grantor and Grantee,* and those

[1] Pursuant to the Federal Property and Administrative Service Act, 40 U.S.C. § 484, the Rhode Island Port Authority and Economic Development Corporation (RIPA) purchased the property from GSA for development purposes.

claiming by, through or under either of them, including without limiting the foregoing generality, estates for a term of years except that the covenants and agreements of the Grantor shall cease to run with the land if the same shall have lapsed as aforesaid. [Emphasis added.]

On December 30, 1986, RIPA transferred 20.3 acres of the surplus property to plaintiffs under two separate deeds.[2] RIPA deeded plaintiffs "all those rights and easements appertaining thereto granted to Grantor [RIPA] by the [GSA] deed." In addition, the Coggeshall Marina deed contained the following restriction:

> This conveyance is made subject to the covenant and restriction that the premises conveyed shall be used for commercial industrial purposes only (excluding all parking areas) until January 1, 2007 and the further covenant and agreement that a marina (boat slips, docks and ancillary uses) of a size comparable to the size of the present marina shall be retained as a use, the owner using best efforts to maintain marina job rolls and job functions, which covenants and agreements shall be deemed to be covenants running with the land for the benefit of the Grantor and the owners of other lands described in the USA Deed ....

Plaintiffs sought to construct residential condominiums in the Bend Boat Basin property. They requested the Portsmouth Planning Board to zone a portion of the property for residential use.[3] The Planning Board invited the Navy to comment

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[2] RIPA transferred 8.5 acres of property to plaintiff Coggeshall Marina, Inc. and 11.8 acres to plaintiff Coggeshall Development Corp. RIPA also conveyed 8.5 acres to Tillotson-Pearson, who granted Coggeshall Development Corp. an option in the property.

[3] Plaintiffs requested that the 11.8 parcel of property be zoned for residential development. This parcel contained no covenants on development or zoning restrictions. Under the RIPA deed, the 8.5 acre parcel could be used only for commercial and industrial purposes until January 1, 2007. Consequently, plaintiffs never sought to zone this parcel for residential purposes.

on the proposal.[4] The Navy informed the Planning Board that it imposed a 12,000 gallon per day limitation on sewage discharge from the Bend Boat Basin area,and that "[s]ewage and water for the proposed subdivision cannot be obtained through Navy utilities. GSA subsequently adopted the Navy's position. Plaintiffs thereupon requested the Navy and GSA to reconsider this decision and to allow 72,000 gallons per day of sewage discharge. Their request for reconsideration was denied by William F. Burke, Director of the Department of Public Works of the Naval Education and Training Center, James A. Peterson, Special Assistant to the GSA Regional Administrator, Boston region, and William Diamond, GSA Regional Director, New York region. Consequently, plaintiffs' zoning request was neither acted upon nor approved.

Plaintiffs brought suit in the United States District Court for the District of Rhode Island seeking injunctive relief "to permit [Coggeshall] the perpetual and assignable right to connect at the boundary of the property owned by the [Navy] such sewer connections and sewer mains as are necessary for the use and enjoyment of [Coggeshall's] property." The district court granted judgment in favor of Coggeshall and "order[ed] that the Navy take [Coggeshall's] future needs into account in its upcoming study of the sewer system's needs and that the Navy within a reasonable time make repairs as required to allow [Coggeshall] to tie into the sewer system for up to the requested total amount of 72,000 gallons of discharge per day." On appeal, the United States Court of Appeals for the First Circuit determined that plaintiffs advanced an "action for breach of contract, irrespective of how it is packaged. The court, therefore, concluded that the Claims Court, not the district court, was the proper forum to litigate the claim. Consequently, the First Circuit vacated

[4] The Planning Board was not authorized to approve zoning requests. Rather, the Board compiled information on the request and reported to the Portsmouth Town Council. Under Rhode Island law, the Town Council could not permit residential development without adequate sewer disposal facilities.

the district court decision and dismissed the action for lack of subject matter jurisdiction.

Plaintiffs instituted suit in this court, seeking $25 million in damages against the government for the alleged breach of the deed covenant. Defendant filed a motion to dismiss the action, contending that plaintiffs essentially request the court to interpret the provisions of the deed and determine the obligations of the parties. As such, defendant maintains that plaintiffs seek equitable relief not available in the Claims Court. In addition, defendant asserts that any claim for damages is premature since the Town of Portsmouth had not zoned plaintiffs' property for the proposed development. Defendant also avers that plaintiffs lack standing to sue the government for breach of the deed covenant. As successors-in-title to the property, plaintiffs claim privity of contract with defendant, enabling them to maintain an action against the United States for breach of a covenant running with the land. In addition, plaintiffs deny that they seek injunctive or declaratory relief from this court. Rather, plaintiffs maintain entitlement to money damages presently due for a breach of contract affecting the development and marketability of their properties.[5]

Discussion

Plaintiffs label their action as breach of contract claim rather than a "taking" claim. This court may entertain claims predicated upon an express or implied-in-fact contract with the United States. 28 U.S.C. § 1491(a). Absent privity of contract, plaintiffs may not advance their claim against the government. *United States* v. *Johnson Controls, Inc.*, 713 F.2d 1541, 1550 (Fed. Cir. 1983).

[5] Plaintiffs filed a "Motion for Summary Judgment as to Liability" on February 23, 1991. The court instructed the parties to brief the issue of standing during a status conference held on March 27, 1991. Consequently, the court suspended the filing of a response by the government until resolution of all jurisdictional issues.

Defendant deeded the property in question to RIPA with the "perpetual and assignable right to connect the boundary of grantee's property with certain sewer mains owned by grantor and located on the other land of grantor." RIPA's right to connect with the sewer mains and the government's obligation to maintain those sewers "touch and concern" the subject property and are, therefore, covenants which run with the land. *See Friends of Sakonnet* v. *Dutra*, 749 F. Supp. 381, 390 (D.R.I. 1990). The deed provides that "[a]ll covenants and agreements as are herein contained in this Deed . . . shall be deemed and shall constitute covenants running with the land, and shall be binding on the successors in title and assigns of both Grantor and Grantee." The deed, therefore, determined the rights and obligations of the parties and their successors concerning the land in question.

The RIPA deed to plaintiffs grants "all those rights and easements appertaining thereto granted to Grantor [RIPA] by the [government] deed." Plaintiffs are successors-in-title to the property RIPA purchased from the United States. As successors to RIPA, plaintiffs inherit the rights and obligations set forth in the original deed between defendant and RIPA. As such, plaintiffs have a contractual relationship with the United States, and may maintain a breach of contract action against defendant for violation of their rights under the deed.

In *Deterding* v. *United States*, 107 Ct. Cl. 656, 69 F. Supp. 214 (1947), a landowner sued the United States under a deed which conveyed an easement over her property for the widening of a neighboring river. Plaintiff was the successor-in-interest to the grantor of the deed. Defendant acquired the easement from the grantee and sold oil and gas interests in the property in contravention of its limited rights under the deed. Plaintiff sought compensation in the Court of Claims, asserting that defendant breached the terms of the deed. Defendant moved to dismiss the case for lack of jurisdiction. The court denied the motion, stating:

> We think that the relation between the plaintiff and the United States, in relation to their respective rights in the land in question, is a conventional or contractual relation, within the meaning of our jurisdictional statute. [Citation omitted.] The deed from plaintiff's predecessor to the predecessor of the United States was a determination and statement of what rights the parties and their successors were to have in this land. When the United States took the Anderson title, it took it, not by acquisition in some overriding capacity as sovereign, but as successor to Anderson, and subject to his obligations, as they were stated in the deed. His obligations became those of the United States, because it was the intent of the parties, and is the rule of law that successors shall be bound.

Id. at 661. In accord with *Deterding*, the court concludes that plaintiffs have standing to pursue their contract claim in this court.

II.

The court must next determine whether plaintiffs state a claim upon which relief can be granted. In reviewing a motion to dismiss under RUSCC 12(b)(4), the court "assume[s] all well-pled factual allegations are true and indulge[s] in all reasonable inferences in favor of the nonmovant." *Gould* v. *United States*, 935 F.2d. 1271, 1273 (Fed. Cir. 1991). Furthermore, all that is required to withstand a motion to dismiss is "a short and plain statement of the claim that gives the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Gould*, 935 F.2d at 1275, *citing Conley* v. *Gibson*, 355 U.S. 41, 47 (1957).

The jurisdiction of the Claims Court is commensurate with the United States' waiver of immunity from suit. It is well established that any waiver of sovereign immunity must be expressed unequivocally. *Fidelity Constr. Co.* v. *United States*, 700 F.2d 1379 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 826 (1984). Historically, the court has only entertained claims

seeking money damages. *United States* v. *King*, 395 U.S. 1 (1969). Consequently, this court cannot grant declaratory or injunctive relief absent an express statutory authorization.[6] There is no statutory authority for the court to render a declaratory judgment in the present case. Plaintiffs must, therefore, advance a monetary claim in order to invoke the jurisdiction of the court.

Plaintiffs purchased the property from RIPA to construct residential condominiums. The Town of Portsmouth refused to zone the property for residential development after defendant set a 12,000 gallon per day sewer discharge limit for the Bend Boat basin area. Plaintiffs assert that defendant breached the deed in refusing to accommodate additional effluent discharge. Plaintiffs do not request the court to order defendant to upgrade and maintain the sewer line passing through its property to handle the additional effluent.[7] Furthermore, they do not merely request an interpretation of the language of the deed. Rather, plaintiffs seek money damages for loss of development of their property. Plaintiffs assert that these damages represent the "natural and probable consequences" of the government breach, namely, the loss in marketability of the property due to limits on sewage capacity.[8]

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[6] For example, Congress amended the Tucker Act to authorize the court to grant declaratory relief in pre-award bid protest controversies. *See* 28 U.S.C. § 1491(a)(3); *Blount, Inc.* v. *United States*, 22 Cl. Ct. 221, 226 (1990).

[7] Indeed, the court recognizes that neither the Claims Court nor federal district courts may order specific performance by the United States of alleged contract obligations. *Florida Dep. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Aktiebolaget Bofors* v. *United States*, 139 Ct. Cl. 642, 153 F.Supp. 397 (1957).

[8] Defendant maintains that the case is not ripe for review because the property in question is not zoned for residential purposes. However, if plaintiffs can establish that defendant breached the deed covenant, and that the breach caused a diminution in value of their property, they would presumably be entitled to money damages against the government. *Russell & Assoc.-Fresno Ltd.* v. *United States*, 219 Ct. Cl. 663, 664 (1979). Read in the light most favorable to plaintiffs, there is a causal relationship between defendant's refusal to accommodate 72,000 gallons of sewage per day and the failure of the Portsmouth Town Council to approve plaintiffs'

Romala Corp. v. *United States*, 20 Cl. Ct. 8, 12-13 (1990); *see also H.H.O.* v. *United States*, 7 Cl. Ct. 703, 707 (1985). In *San Carlos Irr. and Drainage Dist.* v. *United States*, 877 F.2d 957 (Fed. Cir. 1989), the Federal Circuit concluded that the plaintiff-appellant stated a claim for which relief could be granted where it alleged government breach of contract in the operation and maintenance of dam and electrical generation facilities and asserted that damages occurred as a result of the breach. Under the standard applicable to a motion to dismiss, the court concludes that plaintiffs have adequately pled a money oriented claim for breach of contract within the meaning of the Tucker Act, 28 U.S.C. § 1491.

Conclusion

For the foregoing reasons, the court denies defendant's motion to dismiss. Defendant is directed to file its response to plaintiffs' motion for summary judgment by October 4, 1991. No costs.

s/Bohdan A. Futey
BOHDAN A. FUTEY
Judge

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zoning request. For purposes of the instant motion, plaintiffs have set forth sufficient allegations which, if proven, support a viable breach of contract action against defendant.

United States Court of Appeals
For the First Circuit

No. 89-1264

COGGESHALL DEVELOPMENT CORP., ET AL.,

PLAINTIFFS, APPELLEES,

v.

WILLIAM J. DIAMOND, ETC., ET AL.,

DEFENDANTS, APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. FRANCIS J. BOYLE, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
TORRUELLA AND SELYA, *Circuit Judges*.

J. Carol Williams, with whom *Donald A. Carr*, Acting Assistant Attorney General, *Lincoln C. Almond*, United States Attorney, *Everett C. Sammartino*, Assistant United States Attorney, and *Angus E. Crane*, Attorney, Department of Justice Land & Natural Resources Division, was on brief for appellants.

James M. Sloan, III, with whom *Gardner, Sawyer, Gates & Sloan* was on brief for appellees.

September 5, 1989

TORRUELLA, *Circuit Judge*. This appeal could well have been avoided had the government directly raised the defense of sovereign immunity before the district court. Nevertheless, because it goes to the jurisdiction of the court, the defense of sovereign immunity "can be raised at any time, and indeed by a court of appeals on its own motion." *Leonhard* v. *United*

States, 633 F.2d 599, 618 n.27 (2d Cir. 1980), *cert. denied*, 451 U.S.908 (1981); *see also Edelman* v. *Jordan*, 415 U.S. 651, 677-78 (1974); *Hydrogen Technology Corp.* v. *United States*, 831 F.2d 1155, 1162 n.6 (1st Cir. 1987), *cert. denied*, 108 S.Ct. 1995 (1988). Decision of this issue is dispositive of this appeal. We reverse the decision of the district court issuing a writ of mandamus against various officers of the United States and order dismissal of this action for lack of subject matter jurisdiction.

The facts

In 1986, Coggeshall Development Corp. and Coggeshall Marine, Inc. ("Coggeshall") purchased approximately 20.3 acres from the State of Rhode Island Port Authority ("RIPA").This land had been the site of a small boat basin ("Bend Boat Basin") maintained by the United States Navy ("Navy") in Portsmouth, Rhode Island. RIPA acquired the land by conveyance from the General Services Administration ("GSA") when it was surplused by the Navy sometime in early 1978.

The GSA deed to RIPA provided in part:

> The Grantor hereby grants the Grantee all sewer lines located within said parcels 1 and 2, along with the perpetual and assignable right to connect at the boundary of Grantee's property with certain sewer mains owned by Grantor and located on other land of Grantor. *Grantor covenants that it will maintain its sewer mains and appurtenances* which connect sewer lines in the fee area to the City of Newport's public sewer system. (Emphasis added).

In its deed to Coggeshall, RIPA granted "all those rights and easements appertaining thereto granted to Grantor [RIPA] by the [GSA] Deed."

The Navy occupies the land adjacent to the Bend Boat Basin. Through this adjacent land pass the sewer lines leading from the Bend Boat Basin to the Newport sewer plant. Coggeshall submitted a rezoning request to the Portsmouth Plan-

ning Board for approval to construct residential condominiums in the Bend Boat Basin area. The town requested views from the Navy on the proposal.

On April 15, 1987, the Navy notified the Planning Board that it was setting a 12,000 gallon per day sewer discharge limit for the Bend Boat Basin area and that no future increase of this limit could be obtained through the Navy's utilities. Subsequently, this same information was communicated to Coggeshall by the Navy on April 26, 1988. Thereafter, GSA adopted the Navy's position in this respect.

Coggeshall seeks an additional effluent discharge of 60,000 gallons per day to allow full development of the Bend Boat Basin parcel. Pursuant to the above-cited provision in the GSA deed, it claims that it is the Navy's duty to upgrade and maintain the sewer lines that pass through its property so that they can handle the additional effluent discharge.

Claiming the authority of 28 U.S.C. § 1361,[1] Coggeshall brought an action in the United States District Court for the District of Rhode Island against the administrators of GSA for the region in question, and against the Navy's director of public works in Newport, Rhode Island, seeking mandamus relief "to permit [Coggeshall] the perpetual and assignable right to connect at the boundary of the property owned by the [Navy] such sewer connections amd sewer mains as are necessary for the use and enjoyment of [Coggeshall's] property." After trial, the district court granted judgment on behalf of Coggeshall and issued a writ of mandamus "order[ing] that the Navy take [Coggeshall's] future needs into account in its upcoming study of the sewer system's needs and that the Navy within a reasonable time make repairs as required to allow [Coggeshall] to tie into the sewer system for up to the requested total amount of 72,000 gallons of discharge per day."

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[1] 28 U.S.C. § 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel any officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Sovereign immunity

(1) *A jurisdictional issue*

It is beyond discussion that the United States cannot be sued absent an express waiver of its immunity as a sovereign. *Block* v. *North Dakota, ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 287 (1983). "A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Id.* Absent a waiver of sovereign immunity, courts are implied totally lacking in jurisdiction to entertain actions against the United States. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).

(2) *The United States as a party*

Notwithstanding that the United States is not a named party, "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' . . . or if the effect of the judgment would be 'to restrain the government from acting, or to compel it to act.'" *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963).

In certain instances, an action will not be considered against the United States, and thus will not be barred by sovereign immunity, if it is one for specific relief against officers. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). However, to come within this "specific relief" exception a claimant must allege and prove that the officer has acted outside of the scope of his authority. *Id.* at 690.

(3) Waiver of immunity "cannot be implied but must be unequivocally expressed." *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The most commonly known waivers of sovereign immunity by the federal government are, in the field of torts, the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, and in contract disputes, the Tucker Act, 28 U.S.C. § 1491 *et seq.* This of course is hardly an exhaustive list. *See*, for example, 28 U.S.C. § 1346 and 5 U.S.C. § 702. In the case

of actions upon express or implied contracts in which the amount claimed exceeds $10,000, the suit must be filed in the United States Claims Court. 28 U.S.C. § 1491(a)(1); *Philips* v. *United States*, 206 F.2d 867 (9th Cir. 1953).

The only remedy to which the United States has consented in cases of breach of contract is to *the payment of money* damages in either the Court of Claims, if the amount claimed is in excess of $10,000, 28 U.S.C. § 1491(a)(1), or the district courts, where the amount in controversy is $10,000 or less. 28 U.S.C. § 1346(a)(1). Federal courts do not have the power to order specific performance by the United States of its alleged contractual obligations. *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982); *Larson*, *supra*, at 701-02; *Doe* v. *Civiletti*, 635 F.2d 88, 89 (2d Cir. 1980); *Chemung County* v. *Dole*, 781 F.2d 963, 970 (2d Cir. 1986). We are unaware of any waiver of sovereign immunity by the United States as to specific performance for breach of contract. *Cf.* 5 U.S.C. § 702. *See Sea-Land Service, Inc.* v. *Brown*, 600 F.2d 429, 432-33 (3d Cir. 1979).

The provisions of 28 U.S.C. § 1361 creating the federal mandamus action do not constitute a waiver of sovereign immunity by the United States. *Doe*, 635 F.2d at 94; *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 935 (2d Cir. 1978); *Essex* v. *Vinal*, 499 F.2d 226, 232 (8th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975); *Commonwealth of Massachusetts* v. *Connor*, 248 F.Supp. 656, 660 (D. Mass. 1966), *aff'd*, 366 F.2d 778 (1st Cir. 1966) (per curiam). This statute did not make any substantive change in the law or extend the scope of mandamus relief. "'Certainly, Congress did not intend § 1361 to be interpreted so as to allow the extraordinary writ of mandamus to be converted into a device for obtaining piecemeal solution of contractual disputes to which the United States is a party.'" *Doe*, *supra*, at 94 (citing from *Connor*, *supra*, at 660).

Of course, 28 U.S.C. § 1331, the federal question jurisdictional provision alleged in the complaint, is not a general waiver of sovereign immunity. *Doe*, *supra*, at 93. It merely

establishes a subject matter that is within the competence of federal courts to entertain. It does not expand the power of those courts in terms of the parties over whom it may exercise jurisdiction.

The nature of the present action

First, although Coggeshall sought an order to compel officers of the United States to perform what it claims is a ministerial duty owed to it by the United States, the real party defendant is the United States. *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371 (1945) (the court may analyze the case to determine if suit in reality is against the United States). The relief granted will "expend itself on the public treasury or domain," *Dugan*, *supra*, at 620, as the order directs the spending of federal funds to upgrade the sewer system to meet Coggeshall's needs. Furthermore, by requiring the expenditure of these funds on this particular endeavor, diverting them from other Navy projects, the district court's order will be a "restrain[t] on the government from acting or [will] compel it to act." *Id.* Finally, there is no allegation, much less proof, that the officers in question have acted outside their scope of authority. Thus, the suit falls outside the "specific relief" exception, *Larson*, *supra*, and is therefore a suit against the United States rather than the named officers.

Second, this is an action for breach of contract, irrespective of how it is packaged. *In re Sucesores de Abarca, Inc.*, 862 F.2d 394, 396-98 (1st Cir. 1988) (deed and contract claims treated similarly). This conclusion was recognized by the district court when it referred to the action as one "seek[ing] . . . to enforce the *contractual* easement rights granted . . . by the United States in the deed." (emphasis supplied). The court was required to interpret the provisions of the GSA deed and to determine what were the obligations of the Navy vis-a-vis Coggeshall. It was then asked, via mandamus, to order specific performance by the United States of its alleged contractual obligations.

Last ditch arguments

Coggeshall filed a post-oral argument letter claiming that *Bowen* v. *Massachusetts*, 108 S.Ct. 2722 (1988), and the Government Property Act of 1949, 40 U.S.C. § 471 *et seq.* support the actions of the district court in this case. The property in question in this appeal was excessed pursuant to the Government Property Act. Coggeshall points to § 489[2] of that statute as supporting the court's jurisdiction in this case. Leaving aside the lateness of these arguments, which were neither pleaded as a basis for jurisdiction nor relied upon by the district court in its decision, we fail to see how either *Bowen* or the Government Property Act help Coggeshall out of its predicament.

That part of *Bowen* quoted by Coggeshall, that "the District Court had jurisdiction in [that] case [because of] the plain language of the relevant statutes, their legislative history and a practical understanding of their efficient administration," 108 S.Ct. at 2726, is precisely why the cited statute is irrelevant. The plain language of § 489 reveals that it refers to remedies that may be *sought by the United States*, not against it. Nothing in the legislative history of that statute nor its plain language points to *any* waiver of sovereign immunity, much less to an "unequivocally expressed" one. *United States* v. *Testan*, *supra*. Lastly, any analysis of this situation leads to the conclusion that Coggeshall's proposal causes interference with the Navy's attempt at efficient administration of its property.

Reliance on *Bowen*, although alluring, overlooks two basic differences between that case and the present appeal. First, *Bowen* was an action under the sovereign immunity waiver provisions of the Administrative Procedures Act. 5 U.S.C. § 702. Such is not the present case. Secondly, and more important, *Bowen* was not an action for breach of contract. It was a suit to review agency action which was claimed to be contrary to federal law. As we have previously indicated, Cogge-

[2] 40 U.S.C. § 489 is reproduced in the appendix.

shall sues for breach of contract and asks specific performance of the contractual conditions.

Conclusion

The order of mandamus of the district court is vacated and the action is dismissed for lack of subject matter jurisdiction.

Vacated and dismissed.

APPENDIX

40 U.S.C. § 489:

(a) Where any property is transferred or disposed of in accordance with this Act and any regulations prescribed hereunder, no officer or employee of the Government shall (1) be liable with respect to such transfer or disposition except for his own fraud, or (2) be accountable for the collection of any purchase price for such property which is determined to be uncollectible by the Federal agency responsible therefor.

(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder —

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as

the case may be.

(c) The several district courts of the United States and the several district courts of the Territories and possessions of the United States, within whose jurisdictional limits the person, or persons, doing or committing such act, or any one of them, resides or shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit, and such person or persons as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct.

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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c. a. No. 88-0448B

COGGESHALL DEVELOPMENT CORP., ET AL.,

v.

WILLIAM J. DIAMOND, ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION, ET AL.

OPINION

Plaintiffs in this action are Coggeshall Development Corp. and Coggeshall Marina, Inc., two corporations which purchased land from the State of Rhode Island, which had been the former site of a small boat basin maintained by the United States Navy in Portsmouth, Rhode Island. The Plaintiffs now plan to develop part of the land for residential use, creating a need for an additional 60,000 gallons daily of sewer capacity. Part of the property (about 20.3 acres) was acquired by Plaintiffs by deeds dated December 30, 1986. The Rhode Island Port Authority (RIPA) had acquired the property on behalf of the State by deed from the United States dated February 13, 1978.

The land was conveyed by the General Services Administration at a time when the land became surplus to the needs of the U.S. Navy. The land was not needed because the Navy had withdrawn major fleet activities from the Narragansett Bay, Rhode Island area. The Rhode Island Port Authority was created because of the economic crisis created due to the Navy's withdrawal. Its sole purpose was to make the land and facilities acquired from the Navy economically productive.

All of those concerned were certainly aware that the State intended to do its very best to make productive use of the property. Among the activities which have resulted from the Authority's efforts in Rhode Island is its largest private

employer, Electric Boat Division of General Dynamics, located at the former Naval Air Station, Quonset Point, Rhode Island and Derecktor Shipyard, located in the midst of the U.S. Naval Base, Newport, Rhode Island. It was in this atmosphere that the General Services Administration conveyed the property in question to the State of Rhode Island Port Authority.

The 1978 deed to Rhode Island Port Authority in part provided:

> The Grantor hereby grants the Grantee all sewer lines located within said parcels 1 and 2, along with the perpetual and assignable right to connect at the boundary of Grantee's property with certain sewer mains owned by Grantor and located on other land of Grantor. Grantor covenants that it will maintain its sewer mains and appurtenances which connect sewer lines in the fee area to the City of Newport's public sewer system. The Grantee by acceptance of this Deed covenants that it shall pay the pro-rata costs (based on use) of maintaining Grantor's connecting system resulting from Grantee's use thereof, direct charges assessed to Grantee by the furnishing utility or entity; provided that Grantor's obligation to maintain the same shall terminate at such time as such sewer service shall become available to Grantee by a public utility, without utilizing sewer lines then owned by Grantor; and provided that Grantee's obligation to pay the pro rata costs of maintaining Grantor's connecting sewer system shall terminate upon Grantee obtaining such public utility service. Grantee shall be allowed a reasonable time to obtain such public utility sewer service after same shall become available.

The land transferred to Plaintiffs is about 20.3 acres in area. Additionally, the Plaintiffs have an option for adjoining land which if exercised would bring the total acreage to between 28 and 29 acres and which for shorthand purposes has been referred to as "Bend Boat Basin." The Rhode Island Port Authority and Economic Development Corporation, a State

of Rhode Island agency, in its deeds to the Plaintiffs granted "all those rights and easements appertaining thereto granted to Grantor by the USA Deed," being the deed dated February 13, 1978.

This controversy arises because the United States Navy which formerly occupied the land transferred, is the occupant of adjacent government land through which the sewer lines leading to the Newport sewer plant pass. The Navy notified the Planning Board of the Town of Portsmouth by letter dated April 15, 1987 that the sewer's discharge limits for Bend Boat Basin area was set at 12,000 gallons per day. The Navy's letter further stated "that therefore, the utilities into the Bend Boat Basin can only support what presently exists. Expansion of this area or tie ins from outside this area cannot be supported. Sewerage and water for the proposed subdivision cannot be obtained through the Navy utilities." Initially by letter dated April 26, 1988, the attorney for the Plaintiffs was notified by the Navy that "your client is not entitled to any increase in sewer service and the Navy sewer system will not accommodate additional sewerage from your client's private civilian housing development. Additionally, it is not in the Navy's present or future interest to permit such private party connection. Therefore, initiation of any work by your client relating to the Navy's sewer system will serve no useful purpose." By letter dated May 10, 1988 the regional administrator of the General Services Administration stated that, in view of the Navy's opposition "under the circumstances, we regret that we cannot be of further assistance on this matter."

The Court finds the following. The limitation of 12,000 per day of effluent permitted to the Bend Boat Basin arose out of the fact that this was the estimated need for that activity. As the circumstances developed however, Bend acquired only part of the property and the remainder was acquired by the two corporate Plaintiffs in this action, Coggeshall Development Corporation and Coggeshall Marine, Inc. There is no evidence which is based on any study by the Navy that 12,000 gallons are the upper limits of the capacity of the system in

place in 1976, or indeed that that is the situation today. The Plaintiffs seek to add an additional effluent discharge of 60,000 gallons per day. The design capacity of the existing lift stations and conduits has been reached and is being exceeded at certain times. At the same time the Navy is increasing the demands on the existing system particularly by reason of establishment of a fire fighting school and reactivation of Navy housing development known as the "Anchorage" located on West Main Road in Middletown. Additionally, at the present time and for some time past Derecktor Shipyard, a private enterprise located on former Navy land, is also discharging into the system.

By deed dated September 15, 1983, the United States acting through the Administrator of General Services conveyed property south of the location to the Rhode Island Port Authority and in that deed authorized and permitted the Grantee to utilize the existing sewer disposal system for up to an additional 100,000 gallons per day of effluent. This deed provided very specific details of sewage disposal in regard to methods, time and volume. There is no present existing metering system to measure the volume of this effluent.

Under the provisions of R.I. General Laws § 42-64-14(a) the Rhode Island Port Authority is required "in planning and carrying out projects, . . . [to] conform to the applicable provisions of the state guide plan as the same may from time to time be altered or amended. In determining whether its proposed projects are in conformity with the state guide plan, the corporation and all persons dealing with it shall be entitled to rely upon a written statement signed by the chairman or vice-chairman of the state planning council to the effect that the proposed project conforms to the state guide plan."

The testimony is that the state guide plan is a series of documents which in accord with Rhode Island Administrative Procedures Act have been filed with the Secretary of State, State of Rhode Island. The term "state guide plan" is defined in General Laws of Rhode Island § 42-64-3(cc) as "the plan adopted pursuant to § 42-11-10 which establishes the state-

wide planning program." Section § 42-11-10 of Rhode Island General Laws provides in subsection (c):

> "the state guide plan shall be comprised of functional elements or plans dealing with land use; physical development and environmental concerns, economic development; human services; and other factors necessary to accomplish the objective of this section. The state guide plan shall be a means for centralizing and integrating long range goals, policies and plans. State agencies concerned with specific subject areas, local governments, and the public shall participate in the state guide planning process, which shall be closely coordinated with the budgeting process. Short range and project plans and implementing programs shall in general be prepared on a decentralized basis by the agency or agencies responsible in each functional area, and shall be consistent with the framework of policies, and plans established by the state guide plan."

The Defendants have introduced in evidence a document entitled "Assessment and Negative Determination in Connection with the Proposed Disposal of Small Boat Basin (Coggeshall Point Area)" prepared by the General Services Administration dated October 12, 1976, when the now foregone Bend Boat Basin proposal was under consideration. That assessment states in part: "Sewer service to the basin site is provided through Navy-retained mains connecting to the City of Newport's sewage treatment plant. The system's current capacity to serve the subject site is 12,000 gallons daily."

There is also in evidence a Memorandum of Daniel W. Varin, Secretary of the State Planning Council, to the State Planning Council dated May 27, 1976. This memorandum is dated more than 19 months before the Government conveyed the land to the State. That Memorandum in part states with respect to sewage disposal:

> It is estimated that the completed project will produce 8,000 to 12,000 gallons per day of effluent. The sewer lines in the marina complex area will be part of the pur-

chase and the U.S. Government has agreed to maintain connections to the City of Newport's sewer system. The Navy will allow 12,000 per day of effluent through their collection system at this time and additional future needs will be reviewed. The Rhode Island Department of Health feels that effluent estimates may be low but are not likely to pose a problem even if they exceed the allowed 12,000 gallons per day unless the Navy, after review, should deny heavier flows through their system. The sewer lines do have a capacity significantly above estimated flows. Upgrading of the City of Newport's sewage treatment system and increasing of its capacity is currently underway. This will bring the treatment plant's reserve capacity to a point where it could easily absorb any later increases likely to be brought on by possible future expansion of the marina complex. The Newport treatment system is capable of handling current flows from the proposed project even if they were double or triple the given estimates. There is, however, no way of estimating effluent from the proposed retail shops and restaurant being contemplated later, in a second phase. This latter phase of the proposal should be reviewed by the CRMC and the Corps of Engineers as well as the SPP at whatever point plans become more concrete in terms of size, location, and construction details and when operational effects can better be anticipated.

Now, some twelve years later, the capacity of the Newport plant is being expanded. Further, the evidence is that maintenance by the Navy has been given a low priority which according to studies has resulted in substantial ground water infiltration of the Navy sewer system, and reduced capacity due to a failure to repair or replace pumping facilities. The failure to improve the pumping ability of the Navy is advanced as an argument by the Navy why the Navy system cannot not accept additional effluent from the Plaintiff's property. This boot strapping contention is of no avail in view of the Goverment's convenant in the deed that "it will main-

tain its sewer mains and appurtenances which connect sewer lines in the fee area to the City of Newport's public sewer system."

The Government argues on the basis of Mr. Varin's Memorandum and the General Services Assessment and Negative Determination that the Plaintiffs are charged with constructive notice of a 12,000 gallon limitation on the amount of effluent which may be discharged into the Navy sewer lines at Melville. The Government also argues that the quasi mandamus remedy provided by 28 U.S.C. § 1361 applies only against officers of the United States and the Court cannot order the General Services Administration therefore to do anything. Further, it argues that there is no evidence of a mandatory duty on the part of the Government. It argues that the Rhode Island Port Authority did not comply with the governing requirements in the sale of the land to the Plaintiffs and therefore the deed provisions are invalid. Lastly, it argues that the Navy has determined that the capacity of the system is limited to 12,000 gallons of effluent daily and that therefore additional capacity need not be provided.

There is no deed restriction on the volume of effluent that may be discharged from the conveyed property. This could easily have been included in the deeds if it was intended that there be a limitation as was done in the September 15, 1983 conveyance. No limitation is expressed or implied and there is no other document which would give a bona fide purchaser for value either actual or constructive notice of an expressed or implied limitation. There is no evidence that Plaintiffs had actual notice of an alleged limitation.

Generally, an easement which does not specifically include limitations is deemed to be one of unlimited reasonable use. *Sharp* v. *Silva Realty Corp.*, 86 R.I. 276, 285 (1957). Reasonable use is not to be measured only at the time the grant is made, but may also evolve to accommodate subsequent changes in the needs of the dominant estate. *See, e.g., Matteodo* v. *Capaldi*, 48 R.I. 312, 316 (1927) (vehicular easement not limited to vehicles in use at time of grant); *Sharp, supra,*

at 285 (easement "available for the reasonable uses to which the dominant estate may be devoted"); *Penn Bowling Recreation Center, Inc.* v. *Hot Shoppes*, 179 F.2d 64, 66 (D.C. Cir. 1949) (nature and extent of easement may be enlarged so long as servient estate not subject to use by other than dominant estate holders). Plaintiffs, holders of the dominant estate in this case, were granted by virtue of the 1978 deed to Rhode Island Port Authority "the perpetual and assignable right to connect at the boundary of Grantee's property with certain sewer mains owned by Grantor. . . ." That deed contains conditions, that the Grantee pay its pro-rata share for use of the sewers and that it terminate use of the Grantor's sewers once public sewer service is made available, but it contains no limitation or restriction of use. Therefore, Plaintiffs are entitled to at least reasonable use of the sewer system.

The grant of an unlimited easement gives the Grantee "all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement." *Sharp*, *supra*, at 285. The reasonableness of a use is to be determined by the finder of fact. *Id.* The reference in the May 27, 1976 Planning Council Memorandum to later increased capacity "likely to be brought on by possible future expansion of the marina complex" indicates that development of the area was anticipated and expected by all parties, after which "additional future needs will be reviewed." The memorandum also states that "the sewer lines do have a capacity significantly above estimated flows." The effluent expected to be generated by Plaintiffs' proposed residential development is substantially lower than what could be expected by commercial or industrial development. The court finds that the requested capacity is available, subject to some repairs to the system which must be undertaken in any event, and should be extended to the Plaintiffs. The deeds require Plaintiffs to pay their pro rata share of the costs of these improvements.

Defendants allege that the determination of a reasonable amount of effluent to be allowed to Plaintiffs is a discretionary, not ministerial decision, and that therefore it is be-

yond the power of this court.[1] However, Plaintiffs seek only to enforce the contractual easement rights granted them by the United States in the deed to their property. No discretion is involved in determining that Plaintiffs are entitled to "the perpetual and assignable right to connect . . . with the sewer mains owned by [the United States]" as stated in the deed. That has already been agreed to. The United States has granted this right. The government is not afforded the opportunity to renege on its agreements. It must meet its obligations exactly in the same fashion as any other party to its solemn agreement.[2] Hindsight suggests that its agreement could have been and indeed ought to have been more restrictive. This argument is not available to the Government any more than to any other litigant. Plaintiffs must be allowed to connect for reasonable use. While it may be argued that the "reasonable" amount of effluent that Plaintiffs be allowed to release into the Defendant's sewer system involves a discretionary determination, such qualitative decisions have been held subject to judicial review, and will be so held here.[3] It must be said that the proposed additional use is not unreasonable.

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[1] The common law writ of mandamus, codified at 28 U.S.C. § 1361, allows a plaintiff "to compel an officer or employee of the United States or any agent thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1982).

[2] "[T]he United States can, without the authority of any statute, make a valid contract," binding on all parties thereto. *Jessup* v. *United States*, 106 U.S. 147, 152 (1882). By appearing in court, the government "submits to the application of the same principles by which justice is administered between private suitors." *The Siren* v. *United States (The Siren)*, 74 U.S. (7 Wall.) 152, 159 (1868).

[3] In a case originating in Rhode Island, the Army's re-activation of a national guardsman was not held to be so discretionary a decision as to be above review by the courts. *Papaioannou* v. *Commanding Officer, 1st U.S. Army*, 509 F.2d 692, 693-94 (1st Cir. 1975). Nor was a discretionary function deemed involved in a case allowing mandamus jurisdiction against two Army selection boards which had passed over a reserve officer for promotion. *Jones* v. *Alexander*, 609 F.2d 778, 781 (5th Cir. 1980), *reh'g denied*, 613 F.2d 314, *cert. denied*, 449 U.S. 832 (1980).

In addition, the Navy has undertaken a study of the entire sewer system relating to repairs and improvements to the system, set for completion in August, 1989. While the study contemplates the increased needs of the Navy due to the establishment of the fire fighting school and the anticipated increase in Navy ships and personnel at Newport, it does not factor in the needs of the Plaintiffs' properties. The Court finds that, since the Plaintiffs' requested capacity is available once the system is repaired, and since the study relates to the repair of the system, the study must take the Plaintiffs' needs into account. As has been pointed out, Plaintiffs must pay the pro rata share of the costs of this repair.

The government also argues that the Plaintiffs were on either actual or constructive notice of a purported 12,000 gallon limit. This argument is without any merit. The 12,000 gallon figure is not stated in the deeds, nor in any recorded instrument connected with the title to the property. The May 27, 1976 Planning Council Memorandum, including the estimate that the then completed project would produce 8,000 to 12,000 gallons per day and the Assessment and Negative Determination of October 12, 1976, estimating a "current capacity" of 12,000 gallons per day for the site do not constitute notice. The Plaintiffs were under no duty to examine these documents nor were they required to examine any state guide plan documents on file at the Rhode Island Secretary of State's office. If they had, they would not be deemed on notice since there is no evidence that the 12,000 gallon figure is anything but an estimate of the site's current or potential capacity. There is no evidence that it is or was an absolute limit for the site, nor was it intended as such.

Defendants' argument that the 1978 deed from RIPA to Plaintiffs is void for failure to comply with the state guide plan as required by R.I. General Laws is likewise without merit. The evidence is that the state guide plan is a series of documents on file with the Secretary of State's office. There is no evidence that RIPA or Plaintiffs violated applicable provisions

of the state guide plan required by R.I. General Laws § 42-64-14(a). As pointed out, that section provides that a certification of the state planning council that the proposed project is in accord with the state guide plan may be relied upon. There is no evidence that such a certification was not obtained. Further, whether the RIPA and Plaintiffs did or did not comply with any state guide plan requirements is not for these Defendants to argue but rather for the State of Rhode Island to do so. Under 40 U.S.C. § 484(d) a deed executed by or on behalf of an executive agency is conclusive evidence of validity of title.

It is hereby ordered that the Navy take Plaintiffs' future needs into account in its upcoming study of the sewer system's needs and that the Navy within a reasonable time make repairs as required to allow Plaintiffs to tie into the sewer system for up to their requested total amount of 72,000 gallons of discharge per day, on the condition that Plaintiffs pay their pro rata costs (based on use) of maintaining the Navy's connecting system and direct charges assessed to the Navy by the City of Newport.

SO ORDERED.

FRANCIS J. BOYLE

FRANCIS J. BOYLE, Chief Judge
United States District Court
District of Rhode Island

December 22, 1988.

KNOW ALL MEN BY THESE PRESENTS THAT the UNITED STATES OF AMERICA, acting by and through the ADMINISTRATOR OF GENERAL SERVICES, under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377) as amended, and the regulations and orders promulgated thereunder, for consideration paid in the sum of FIVE HUNDRED TWENTY-FIVE THOUSAND DOLLARS ($525,000.00), grants to the RHODE ISLAND PORT AUTHORITY AND ECONOMIC DEVELOPMENT CORPORATION, a governmental agency and public instrumentality of the State of Rhode Island, two certain parcels of land, together with the buildings, structures and improvements thereon, situated in the Town of Portsmouth, County of Newport, State of Rhode Island, shown as Parcel 1 and Parcel 2 on a Plan attached hereto and made a Part hereof, entitled "BEND, INC. BOAT BASIN MELVILLE PORTSMOUTH RHODE ISLAND SCALE 1" = 200'"prepared by ROBERT E. LYNCH, P.E. dated April, 1976 Revised May, 1976 (hereafter called "Boat Basin Plan") and together bounded and described as set forth on Exhibit A annexed hereto prior to the execution hereof and incorporated herein by reference as if fully set out herein.

TOGETHER WITH all right, title and interest, if any, of Grantor in the area shown and designated as "Basin" on the Boat Basin Plan;

EXCEPTING, EXCLUDING AND RESERVING unto the Grantor the exclusive right of navigation within that 50 feet adjacent to the westerly sea wall designated as "Safety Zone" on the Boat Basin Plan and also reserving the exclusive right of navigation within a 50 foot radius from the point designated as C-162 as shown on the Boat Basin Plan, and also reserving the non-exclusive right of navigation to and from Narragansett Bay to the two said areas wherein Grantor has the right of exclusive navigation.

Grantor hereby and herein grants, conveys, and releases to Grantee all its right, title, and interest, including all its right of passage or right of way to cross, and in and to, that land lying between Said Parcels 1 and 2 and shown on the Boat Basin Plan as land of Penn Central Co., to whatever extent and of whatever nature the same may be.

Grantor hereby grants to Grantee a right of way for passage on foot and with vehicles, from West Main Road over an existing roadway, sometimes called Stringham Road, said right of way to be its present width from West Main Road to Navy gate 51 as now located and thereafter a width of 80 feet, being 40 feet on each side of the centerline of said roadway to the intersection of Stringham Road with Alexander Road, so called. Together with a right of way for passage on foot and with vehicles northerly along Alexander Road, so called, to the premises. Said right of way to be in width as now exists until such time as Alexander Road may be improved by Grantor to a width of 80 feet. Together also with the right to erect a reasonable number of signs, consistent with reasonable safety requirements to be used in conjunction with the Grantor and its successors and assigns from West Main Road along Stringham Road and Alexander Road to the premises.

ALSO EXCEPTING, EXCLUDING AND RESERVING unto the Grantor ownership of, and perpetual easement right for the operation, maintenance, repair and replacement of an existing 12" water main, as shown on NAVFAC Plan No. 637-988, and also an 8" and 12" main shown on NAVFAC Plan 637-990, said Plans to be recorded herewith. Grantor hereby grants to Grantee all connections to said water mains along with the right to use said mains for water service. Grantee covenants by acceptance of this Deed to install meters at all activated connections and pay water charges directly to the furnishing utility or entity. Grantor covenants to maintain said water mains; provided that such obligation to maintain the same shall terminate in the event that water service becomes available to Grantee by a public utility, without

utilizing water mains then owned by Grantor. Grantee shall be allowed a reasonable time to obtain such public utility water service after same shall become available. Grantor's use of the water service easement area shall be non-exclusive provided that the Grantee shall protect said mains in any construction or operation in and over the easement area.

The Grantor hereby grants to Grantee all sewer lines located within said Parcels 1 and 2, along with the perpetual and assignable right to connect at the boundary of Grantee's property with certain sewer mains owned by Grantor and located on other land of Grantor. Grantor covenants that it will maintain its sewer mains and appurtenances which connect sewer lines in the fee area to the City of Newport's public sewer system. The Grantee by acceptance of this Deed covenants that it shall pay the pro-rata costs (based on use) of maintaining Grantor's connecting system resulting from Grantee's use thereof, direct charges assessed to Grantee by the furnishing utility or entity; provided that Grantor's obligation to maintain the same shall terminate at such time as such sewer service shall become available to Grantee by a public utility, without utilizing sewer lines then owned by Grantor; and provided that Grantee's obligation to pay the pro rata costs of maintaining Grantor's connecting sewer system shall terminate upon Grantee obtaining such public utility sewer service. Grantee shall be allowed a reasonable time to obtain such public utility sewer service after same shall become available.

The Grantor hereby grants to Grantee all electric lines and appurtenances located within said Parcels 1 and 2 along with the perpetual and assignable right to connect at the boundary of Grantee's property with certain electric lines and appurtenances which connect electric lines in the fee area to the Newport Electric Company's System. Grantor covenants to maintain said electric lines and appurtenances. Grantee by acceptance of this Deed covenants that it shall pay the pro-rata costs (based on use) of maintaining Grantor's connecting system resulting from Grantee's use thereof, direct charges

assessed to Grantee by the furnishing utility or entity; provided that Grantor's obligation to maintain the same shall terminate at such time as such electric service shall become available to Grantee by a public utility, without utilizing electric lines and appurtenances then owned by Grantor; and provided that Grantee's obligation to pay the pro rata costs of maintaining Grantor's connecting electric system shall terminate upon Grantee obtaining such public utility electric service. Grantee shall be allowed a reasonable time to obtain such public utility electric service after same shall become available.

Grantee acknowledges by acceptance of this Deed that the existing telephone system in Parcels 1 and 2 is the property of New England Telephone Company; and said property is thereby conveyed subject to said Company's rights in said system. The Grantor hereby covenants to maintain certain Grantor owned telephone lines and appurtenances connecting lines in Parcels 1 and 2 to the New England Telephone system. Grantor hereby grants to Grantee the perpetual and assignable right to connect and use the said telephone lines and appurtenances owned by Grantor and Grantee covenants by acceptance of this Deed that it shall pay the pro-rata costs (based on use) of maintaining Grantor's connecting system resulting from Grantee's use thereof, direct charges assessed to Grantee by the furnishing telephone utility or entity; provided that Grantor's obligation to maintain Grantor owned telephone lines and appurtenances shall terminate at such time as such telephone service shall become available to Grantee by a public utility, without utilizing telephone lines and appurtenances owned by Grantor; and provided that Grantee's obligation to pay the pro rata costs of maintaining Grantor's connecting telephone system shall terminate upon Grantee appurtenances owned by Grantor; and provided that Grantee's obligation to pay the pro rata costs of maintaining Grantor's connecting telephone system shall terminate upon Grantee obtaining such public utility telephone service. Grantee shall be allowed a reasonable time to obtain such

public utility telephone service after same shall become available.

Wherever in this deed Grantee covenants to pay a pro rata share (based on use) of maintaining any of the Grantor's connecting utility systems, Grantee shall be entitled to decline to participate in such maintenance cost by notice in writing to Grantor, in which event Grantor's obligation to maintain such system and Grantee's rights to connect to such system shall terminate and cease as hereafter set forth. Before terminating any utility service on account of Grantee's failure or declination to pay for such service or pro rata costs of maintaining Grantor's connecting utility systems, Grantor shall first suspend such service for a period of 60 calendar days, during which 60 days Grantee shall have the right to restoration of such service by payment of any and all utility service charge arrearages and payment of or assumption of liability for any and all pro rata costs of maintenance for Grantor's connecting utility systems.

ALSO EXCEPTING, RESERVING AND EXCLUDING ownership of, and easement rights for, the operation, maintenance, repair and replacement of a drain pipe running along with north side of Building 117 and continuing in a general westerly direction to Grantor retained land, as shown on NAVFAC Plan No. 627295, to be recorded herewith. The Grantor's use of the above easement area is to be non-exclusive; however, the Grantee covenants that it will protect said pipe in any construction or operation in and over the said easement area.

Grantee covenants that it will prohibit the operation of any pumping station, electric substation, welding operations, open-fire operations or similar activities in fire areas which are within 50 feet of "fire danger points" identified on the Boat Basin Plan and described in the legal description hereinafter set forth, said areas being shown on said Boat Basin Plan in each instance as a 50 foot radius from a "fire danger point".

This Deed is executed and delivered to the said RHODE ISLAND PORT AUTHORITY AND ECONOMIC DEVELOPMENT CORPORATION, its successors and assigns, without any warranties of title whatsoever, either express or implied.

Wherever in this Deed reference is made to the Grantor or Grantee, the same shall be read and construed so as to include the successors in title and assigns of both Grantor and Grantee, as well as any person, firm or entity claiming by, through or under said Grantor or Grantee, and their respective successors in title and assigns.

All covenants and agreements as are herein contained in this Deed, whether made by Grantor or Grantee, shall be deemed and shall constitute covenants running with the land, and shall be binding upon the successors in title and assigns of both Grantor and Grantee, and those claiming by, through or under either of them, including without limiting the foregoing generality, estates for a term of years except that the covenants and agreements of the Grantor shall cease to run with the land if the same shall have lapsed as aforesaid.

The property transferred hereby was duly determined to be surplus and was assigned to the Administrator of General Services for disposal pursuant to the Federal Property and Administrative Services Act of 1949 (63 Stat. 377) as amended, and applicable rules, orders, and regulations.

EXHIBIT A

Those two certain lots or parcels of land, together with all buildings and improvements thereon, situated in the Town of Portsmouth, County of Newport, State of Rhode Island, Parcel lying on the easterly side of the right-of-way, now or formerly the Penn Central Railroad Company, and Parcel 2 on the westerly side of said railroad right-of-way and being a part of the "Melville Small Boats Basin" area formerly occupied by the United States Navy.

PARCEL 1. Beginning at a point which is 35.25 feet N73°38'W from railroad base line station 592 + 98.45, which point is at the southwesterly corner of Parcel 1 and in the easterly line of the railroad right-of-way;

THENCE northerly along the railroad right-of-way along the arc of a curve to the right, having a radius of 5,694.40 feet, a distance of 126.86 feet to a point of tangency opposite railroad base line station 591 + 71.59;

THENCE N19°06'09"E a distance of 670 feet, more or less, to a chain link fence and other land of the United States of America;

THENCE S49°51'E along the chain link fence a distance of 102.59 feet to an angle;

THENCE S45°03'E along the chain link fence a distance of 175.93 feet;

THENCE S18°47'W 691.75 feet to a corner ("Point A");

THENCE N73°38'W a distance of 224.81 feet to the point and place of beginning, the last four courses being along land of the United States of America, said parcel containing 3.9 acres of land, more or less.

PARCEL 2. Beginning at the northeasterly corner of the premises at a point of 48.42 feet N58°41'00"W from base line station 583 + 06.46 of the right-of-way now or formerly of the Penn Central Railroad Company, which point is in the westerly line of said railroad right-of-way and is at the corner of a chain link fence;

THENCE S19° 06'09"W a distance of 862.20 feet to a point of tangency opposite railroad base line station 591 + 71.59;

THENCE continuing along the arc of a curve to the left having a radius of 5,776.90 feet, to a corner ("Point B"), Point B being 47.25 feet N71°14'W from railroad base line station 595 + 27.00;

THENCE S63°46'W a distance of 104.39 feet to a corner;

THENCE N67°34'W a distance of 140.06 feet to a corner ("Point C");

THENCE S20° 23'W a distance of 360.10 feet ("Point D");

THENCE N82°08'W a distance of 236.10 feet to a corner;

THENCE N17° 15'E a distance of 25 feet, more or less, to the westerly face of a concrete bulkhead and the waters of Melville Small Boats Basin and Narragansett Bay ("Point E"), the preceding five courses along land of the United States of America;

THENCE N21°54'E along the westerly face of concrete bulkhead about 1,135 feet, more or less;

THENCE westerly, southerly, northerly and easterly by the mean high water of Narragansett Bay about 2,990 feet, more or less, to a chain link fence and land of the United States of America;

THENCE S58°41'00"E along the chain link fence and land of the United States of America a distance of 265 feet, more or less, to the point and place of beginning.

Said parcel of land contains 24.9 acres of land, more or less.

Said Parcels 1 and 2 along with the location of certain fire danger points are shown on a plan of land entitled "BEND, INC. BOAT BASIN MELVILLE PORTSMOUTH RHODE ISLAND SCALE 1" = 200' ROBERT E. LYNCH, P.E., APRIL, 1976 REVISED MAY, 1976".

Locations of fire danger points as identified on said plan are as follows:

1. Point designated "C-164" located 56 feet N68°47'E from Point A in description of Parcel 1;

2. Point designated "Vent" and situated 24 feet from Point B in Parcel 2, as measured along the railroad right-of-way;

3. Point designated "Gas Separator" situated 17 feet S29°37'E from Point C, Parcel 2;

4. Point designated "C-163" located 105 feet S86°23'W from Point D, Parcel 2; and

5. Point designated "C-162" located 145 feet S82°00'W from Point E, Parcel 2.

The United States acquired title to the above described property by deed dated November 2, 1900 and corrective deed dated May 2, 1903 both from Grosvenor Calkins, Trustee for the Washby Wire Company, said deeds being recorded in the Portsmouth Land Evidence Records at Book 22, Page 121 et seq., and Book 24 Pages 278-279, respectively.

IN WITNESS WHEREOF, the UNITED STATES OF AMERICA, acting by and through the ADMINISTRATION of GENERAL SERVICES, has caused these presents to be executed as a sealed instrument in its name and behalf this 13th day of February , 1978.

UNITED STATES OF AMERICA
Acting by and Through the
ADMINISTRATOR OF GENERAL SERVICES

By L. F. BRETTA
L. F. BRETTA
Acting Regional Administrator
General Services Administration
Boston, Massachusetts

WITNESSES:

HELEN R. BALDASARIAN
RUTH A. JANOWITCH

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK ss.

In Boston, in said County and State, on this 13th day of February , 1978, before me personally appeared L. F. BRETTA, Acting Regional Administrator, General Services Administration, Boston, Massachusetts, duly empowered and authorized and delegated by the Administrator of General Services, to me known and known by me to be the party executing the foregoing instrument and acknowledged said instrument by him duly executed to be the free act and deed

of the UNITED STATES OF AMERICA, as his free act and deed individually, and in his capacity as Regional Administrator, General Services Administration, Boston, Massachusetts.

ARTHUR J. PITTS

ARTHUR J. PITTS
Notary Public
My Commission Expires
May 21, 1982

DEED

Rhode Island Port Authority and Economic Development Corporation, a government agency and public instrumentality of the State of Rhode Island, for consideration paid, grants to Coggeshall Development Corp., a Rhode Island corporation, whose address is c/o 1309 Turks Head Building, Providence, Rhode Island 02903, the following:

> All its right, title and interest in and to that parcel of land, with all buildings and improvements thereon, situated at Melville, in the Town of Portsmouth, Rhode Island, more particularly described in *Exhibit A* attached hereto and made a part hereof by reference.

Being a portion of the premises conveyed to the Grantor by deed of the United States of America ("USA DEED") dated February 13, 1978, and recorded in Portsmouth, Rhode Island Records of Land Evidence in Book 87 at page 137-145, inclusive, and shown on that recorded plot entitled "Bend, Inc. Boat Basin Melville Portsmouth Rhode Island Scale 1" = 200'" prepared by Robert E. Lynch, P.E. dated April, 1976 Revised May, 1976. ("Boat Basin Plan.").

TOGETHER WITH all those rights and easements appertaining thereto granted to Grantor by the USA Deed.

Conveyance is made SUBJECT TO (i) those reservations, restrictions, easements, covenants and limitations imposed upon the granted premises and upon the rights and easements appurtenant thereto by the USA Deed, which are incorporated herein by reference; (ii) the easement granted by the United States of America to New England Telephone & Telegraph Company, dated August 15, 1958 in Portsmouth Book 65 at page 233, insofar as it affects the premises conveyed hereby.

Subject to taxes assessed December 31, 1985 and 1986.

IN WITNESS WHEREOF, this instrument has been executed by the proper officer of Rhode Island Port Authority and Economic Development Corporation this 30th day of December, 1986.

RHODE ISLAND PORT AUTHORITY AND
ECONOMIC DEVELOPMENT CORPORATION

BY LOUIS A. FAZZANO
LOUIS A. FAZZANO, Executive Director

State of Rhode Island
County of Providence

In Providence on the 30th day of December, 1986, before me personally appeared Louis A. Fazzano, to me known and known by me to be the Executive Director of Rhode Island Port Authority and Economic Development Corporation, and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Rhode Island Port Authority and Economic Development Corporation.

RICHARD W. BILLINGS
Notary Public
RICHARD W. BILLINGS

PARCEL C

Beginning at a point 475.00 feet S19'-06'-09"W from a point 48.42 feet N58°41'00"W from the base line station 593-06.46 of the right-of-way now or formerly of the Penn Central Railroad Company which point is i the westerly line of said railroad right-of-way;

Thence, S19°06-'-09"W a distance of 245.00 feet to a point;

Thence, turning an interior angle of 90°-00'-00" and running westerly 335.00 feet, to a corner;

Thence turning an interior angle of 90°-00'-00" and running northerly bounding westerly on land now or formerly of the Rhode Island Port Authority and Economic Development Council, a distance of 150.00 feet;

Thence turning an interior angle of 270°-00'-00" and running westerly bounding southerly on said Rhode Island Port Authority and Economic Development Council 75.00 feet, more or less, to the mean high water of Narragansett Bay;

Thence, running westerly, southerly, westerly, northerly and easterly, about 2,170 feet, more or less, to a corner;

Thence, turning and running S19°-06'-09"E a distance of 110.00 feet, more or less, to a corner;

Thence, turning an interior angle of 270°-00'-00" and running easterly a distance of 565.00 feet to a corner, thence, turning an interior angle of 90°-00'-00" and running southerly 150.00 feet to the corner;

Thence, turning an interior angle of 270°-00'-00" and running easterly 150.00 feet to a corner and point of beginning;

Said parcel contains 11.8 acres, more or less.

EXHIBIT A

DEED

Rhode Island Port Authority and Economic Development Corporation, a government agency and public instrumentality of the State of Rhode Island, for consideration paid, grants to Coggeshall Marina Inc., a Rhode Island corporation, whose address is c/o 1309 Turks Head Building, Providence, Rhode Island 02903, the following:

> All its right, title and interest in and to that parcel of land, with all buildings and improvements thereon, situated at Melville, in the Town of Portsmouth, Rhode Island, more particularly described in *Exhibit A* attached hereto and made a part hereof by reference.

Being a portion of the premises conveyed to the Grantor by deed of the United States of America ("USA DEED") dated February 13, 1978, and recorded in Portsmouth, Rhode Island Records of Land Evidence in Book 87 at page 137-145, inclusive, and shown on that recorded plot entitled "Bend, Inc. Boat Basin Melville Portsmouth Rhode Island Scale 1" = 200'" prepared by Robert E. Lynch, P.E. dated April, 1976 Revised May, 1976. ("Boat Basin Plan.").

TOGETHER WITH all those rights and easements appertaining thereto granted to Grantor by the USA Deed.

Conveyance is made SUBJECT TO (i) those reservations, restrictions, easements, covenants and limitations imposed upon the granted premises and upon the rights and easements appurtenant thereto by the USA Deed, which are incorporated herein by reference; (ii) the easement granted by the United States of America to New England Telephone & Telegraph Company, dated August 15, 1958 in Portsmouth Book 65 at page 233, insofar as it affects the premises conveyed hereby.

This conveyance is made subject to the covenant and restriction that the premises conveyed shall be used for commercial/industrial purposes only (excluding all parking areas) until January 1, 2007 and the further covenant and agreement that a marina (boat slips, docks and ancillary uses) of a size

comparable to the size of the present marina shall be retained as a use, the owner using best efforts to maintain marina job rolls and job functions, which covenants and agreements shall be deemed to be covenants running with the land for the benefit of the Grantor and the owners of other lands described in the USA Deed and that, the damages for breach of the same being inadequate and difficult to establish, it is agreed that injunctive and other suitable equitable relief shall be granted for the breach thereof.

Subject to taxes assessed December 31, 1985 and 1986.

IN WITNESS WHEREOF, this instrument has been executed by the proper officer of Rhode Island Port Authority and Economic Development Corporation this 30th day of December, 1986.

RHODE ISLAND PORT AUTHORITY AND
ECONOMIC DEVELOPMENT CORPORATION

BY s/LOUIS A. FAZZANO
LOUIS A. FAZZANO, Executive Director

State of Rhode Island
County of Providence

In Providence on the 30 day of December, 1986, before me personally appeared Louis A. Fazzano, to me known and known by me to be the Executive Director of Rhode Island Port Authority and Economic Development Corporation, and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Rhode Island Port Authority and Economic Development Corporation.

s/RICHARD W. BILLINGS
Notary Public
RICHARD W. BILLINGS

PARCEL B

Beginning at a point 720.00 feet S19°-06'-09"W from a point 48.42 feet N58°-41'-00"W from the base line station 583 + 06.46 of the right-of-way now or formerly of the Penn Central Railroad Company which point is in the westerly line of said railroad right-of-way.

Thence, S19°-06'-09"W a distance of 142.2 feet to a point of tangency opposite railroad base line station 591 + 71.59;

Thence, copntinuing along the arc of a curve to the left, having a radius of 5,776.90 feet, to a corner, said point being 47.25 feet N71°-14'W from railroad base line station 595 + 27.00;

Thence, S63°-46'W a distance of 104.39 feet to a corner;

Thence, N67°-34'W a distance of 140.06 feet to a corner;

Thence, S20°-23'W a distance of 360.10 feet;

Thence, N82°-08'W a distance of 236.10 feet to a corner;

Thence, N17°-15'E a distance of 25 feet more or less to the westerly face of a concrete bulkhead and the waters of Melville Small Boat Basin and Narragansett Bay, the preceding five courses along land of the United States of America;

Thence, N21°-54'E along the westerly face of a concrete bulkhead about 1,135 feet, more or less, to a corner;

Thence, turning and running easterly bounding northerly on land now or formerly of the Rhode Island Port Authority and Economic Development Council 75.0 feet, more or less, to a corner;

Thence turning an interior angle of 90°-00'-00" and running southerly bounding easterly on land now or formerly of Rhode Island Port Authority and Economic Development Council, a distance of 150.00 feet;

Thence turning an interior angle of 270°-00'-00" and running easterly bounding northerly on land now or formerly of Rhode Island Port Authority and Economic Development Council 335.00 feet to the point and place of beginning.

Said parcel containing 8.5 acres more or less.

EXHIBIT A

DEPARTMENT OF THE NAVY
SUBMITTED BY:
COMMANDER, NAVAL FACILITIES
ENGINEERING COMMAND

DISPOSAL REPORT NO. 434

Station Designation: Naval Supply Center, Newport, Rhode Island

Former Use: Supply and Support of Fleet Units and Shore Activities

ACQUISITION COST

Area-Acres	Land	Improvements	Total
856.0 fee owned	$454,910	$27,342,029	$27,796,939
98.6 to be retained	51,236	5,212,327	5,263,563
757.4 to be disposed of	$403,674	$22,129,702	$22,533,376

Consideration: None. To be reported to the General Services Administration as excess.

1. The Department of the Navy proposes to report as excess approximately 757.4 acres of land and improvements located at the Naval Supply Center, Newport, Rhode Island.
2. The Naval Supply Center is included in the Navy's Shore Establishment Realignment Study and as indicated in the Department of Defense News Release of 17 April 1973 the activity is to be disestablished by June 1974.
3. The mission of the Naval Supply Center is to provide supply, support, and fueling services to Fleet Units and Shore Activities.
4. The land to be excessed was acquired by the Government by cession, purchase and condemnation proceeding between 1881 and 1943. The improvements on the excess land are general supply buildings, administrative space, reservoir, tank farms and piers.
5. The property is to be excessed with the provision that a 1.3 million barrel oil storage capacity, with attendant facil-

ities, be reserved for Defense fuel storage. The 98.6 acres of land with improvements will be retained for use by other Navy Activities in the area.

6. The Department of the Navy does not contemplate acquisition of any land for similar use at or near the activity. The property has been screened throughout the Department of Defense and the Coast Guard with negative results.

7. The excessed land will be disposed of under the authority of the Federal Property and Administrative Services Act of 1949, as amended. This disposal has been approved by the Assistant Secretary of Defense (Installations and Logistics) and is being reported pursuant to Title 10 U.S.C. 2662 as amended.

SUBMITTED TO ASC's

31 August 1973

DEPARTMENT OF THE NAVY
NAVAL EDUCATION AND TRAINING CENTER
NEWPORT, RHODE ISLAND 02841-5000

IN REPLY REFER TO:

26 April 1988

CERTIFIED MAIL

JAMES M. SLOAN III, ESQUIRE
GARDNER, SAWYER, GATES & SLOAN
1309 Turks Head Building
Providence, Rhode Island 02903

Dear Mr. Sloan:

As you acknowledged in your letter of March 24, 1988, you were provided all the documentary information you requested under the Freedom of Information Act (FOIA) concerning the Navy's sewage collection system. Your continued request for on-site inspection of the system is not cognizable under FOIA, as you were previously informed by our letter of March 18, 1988. The Navy has cooperated with your client. However, should you desire to meet to discuss the documentary information provided under FOIA, that can be arranged.

Under the circumstances your client should seek alternative sewage disposal sources, as other civilian housing developers have done in the local area. Our earlier communications to you on this matter are reaffirmed.

To briefly recapitulate, you have been informed consistently that the Navy will not take additional sewage to accommodate your client's private civilian housing at Bend Boat Basin. Your client is not entitled to any increase in sewer service, and the Navy sewer system will not accommodate additional sewage from your client's private civilian housing development. Additionally, it is not in the Navy's present or future interest to permit such private party connection.

Therefore, initiation of any work by your client relating to Navy's sewer system will serve no useful purpose.

Sincerely,

W. F. BURKE

W. F. BURKE
Commander, CEC, USN
Director for Public Works
By direction of the Commander

GENERAL SERVICES ADMINISTRATION
Thomas P. O'Neill Jr. Federal Building
10 Causeway Street
Boston, MA 02222

May 10, 1988

James M. Sloan, III
Attorney at Law
Gardner, Sawyer, Gates & Sloan
1309 Turks Head Building
Providence, Rhode Island 02903

Dear Mr. Sloan:

This refers to your letter dated April 17, 1988 regarding sanitary sewer service to the Melville Area of the Naval Education and Training Center, Newport.

As discussed with you, representatives of this office have met with Navy officials regarding your client's concerns. By letter dated April 26, 1988, Navy officials responded to you directly, re-affirming their position that the existing system cannot accommodate any additional sewage at this time.

Under the circumstances, we regret that we cannot be of further assistance on this matter.

Sincerely,

James A. Peterson

James A. Peterson,
Special Assistant to the
Regional Administrator